Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

STAINLESS SYSTEMS INCORPORATED,
Petitioner,

v.

NEXTEL WEST CORP., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

CHARLES D. CHALMERS
Counsel of Record

20 SUNNYSIDE AVENUE
SUITE A#199
MILL VALLEY, CA 94941-1928
(415) 860-8134

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTIONS PRESENTED

Whether a class member has standing to object to the release of claims in a class action settlement?

Whether a class action settlement fails the fair and reasonable requirements of Rule 23(e)(1)(C) when class members receive no compensation for a reason unrelated to the merits of the class claims?

Whether a class action settlement fails the fair and reasonable requirements of Rule 23(e)(1)(C) when class members must indefinitely continue a business relationship with a defendant service provider to receive compensation?

PARTIES TO THE PROCEEDING BELOW

Petitioner Stainless Systems Incorporated was an appellant below. Nextel Communications, Inc., Nextel West Corporation, and Nextel Partners, Inc., were appellees in the court below, and defendants in the district court. Joseph A. Blando and James Sanders were appellees in the court below, and plaintiffs in the district court.

Other appellants below, who were objectors in the district court, were: Meliza Aldea, William Friedrich; Peter Friedrich; SS&E Trucking, Paul Lamia, Steve Strange, Steven Robertson, Diane Hohne, Christopher Freeman, Susan Martelli, Joseph Martelli, Rolando Prado, Richard Thompson, Hipolito Gonzalez, Pete A. Gonzalez, Robert Falkner, Daniels & Daniels, PA, Bravo Restaurants, Heights Glass, Ralph St. George, and Ambrose Petroleum.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Stainless Systems Incorporated has no parent corporation and no public corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Stainless Systems Incorporated respectfully prays that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

Petitioner seeks to appeal a judgment approving a class action settlement. The opinion of the U.S. Court of Appeals (Pet. App. 3a - 20a.) is reported at 396 F.3d 922. The judgment and order of the U.S. District Court for the Western District of Missouri (Pet. App. 21a - 59a.) are unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on February 1, 2005. The order denying rehearing, and rehearing, en banc, (Pet. App. 1a - 2a.) was entered March 11, 2005.

STATUTE INVOLVED

Federal Rule of Civil Procedure 23 provides, in pertinent part:

26(e)(1)(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

26(e)(4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

STATEMENT OF THE CASE

This is a consumer class action originally filed in state court. Defendants provide cellular telephone service. The action involves a monthly charge imposed on their customers called the Federal Programs Cost Recovery Fee ("the Fee"). The action was removed to the Western District of Missouri. Plaintiffs filed a motion for remand. While the motion was pending the parties reached an agreement for settlement. The plaintiffs filed an amended complaint adding a claim under the Communications Act of 1934, 47 U.S.C. § 201(b) (prohibition against unfair charges, practices, classifications and regulations) to insure federal jurisdiction. The parties then sought approval of the settlement.

A number of class members filed objections to the settlement. The District Court conducted a fairness hearing and thereafter approved the settlement. Six separate appeals were pursued, generally raising different issues. The Eighth Circuit affirmed on all issues.

1. Petitioner's challenges to the settlement do not question the settlement amount. The first objection is to the release of certain claims by the settlement agreement. Petitioner objected to the release of particular claims that are based on a different set of facts than the claim asserted in the action. The district court did not consider this objection. It held that petitioner did not have standing to object to the release because he had not already made a claim of the kind that would be released. Pet. App. 54a. The Eighth Circuit affirmed that ruling. Pet. App. 14a ftnt 7.

2. Petitioner's second objection challenges a settlement structure which results in millions of class members receiving no compensation. This was referred to below as the

"shrinking benefits" objection. "Shrinking benefits" occurs because the settlement creates two described classes, and a *de facto* third class. The first class is Class A or "current subscribers." This class is defined simply by the name "current subscribers." The second class is Class B or "former subscribers." This class is defined as the subscribers who terminated with defendants prior to September 30, 2003. The *de facto* third class is the Class A or current subscribers who are no longer current subscribers when settlement benefits are distributed. The settlement benefits for Class A current subscribers are free minutes of usage on Nextel's cellular service. Former subscribers receive compensation in several forms, ranging from money to a credit if they decide to re-establish an account with defendants. The members of the *de facto* class receive nothing, because they do not qualify for either of the two described classes.

The "shrinking benefits" results from the fact that settlement benefits will not be distributed until the settlement becomes final, which is after the expiration of the time for all possible appeals. S.A. 142 and S.A. 151-152.[1] Even then the defendants have another ninety days before they must *begin* benefit distribution. S.A. 152. The settlement has no provision for when defendants must *complete* benefit distribution. The *de facto* class members were Class A current subscribers when the settlement was executed but they have ceased doing business with defendants prior to the distribution of benefits. Since they are no longer subscribers they can not

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[1] Each of the several appellants below in the consolidated appeal filed a separate appendix. The citation used herein, "S.A." refers to petitioner's separate appendix in appeal no. 04-2298. A part of petitioner's separate appendix was filed under seal, and is cited herein as "S.A.U.S."

receive the current subscriber benefit of free minutes. There is no other benefit for them, such as those provided to Class B former customers. They are not Class B former subscribers because that class is precisely defined as those who terminated prior to September 30, 2003.

Undisputed evidence shows that defendants lose subscribers at the rate of 1.5% per month. S.A. 22-23. There were 13.7 million Class A current subscribers as of the fairness hearing on January 9, 2004. Pet. App. 34a. As of the filing of this petition no less than 39% or 5.3 million Class A current subscribers have lost any benefit from the settlement.[2]

The district court noted the objection. Pet. App. 55a-56a. Since it approved the settlement it rejected the objection, but all it said by way of explanation was: "Obviously, the wireless market is constantly changing and Nextel gains and loses customers every day. The Court finds that the Settlement clearly and specifically defines those customers who are entitled to receive benefits." *Id.* The Court of Appeals affirmed. Pet. App. 18a – 20a.

3. A petition for rehearing en banc was denied. This petition followed.

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[2] At the rate of 1.5% per month 30% have lost the benefits as June 1, 2005. The above calculation assumes 2 months for a decision on this petition, another 25 days for a petition for rehearing before this Court, and then 90 days before the defendants must commence benefit distribution.

REASONS FOR GRANTING THE WRIT

The petition for certiorari should be granted for three reasons.

First, the Eighth Circuit's holding that a class member does not have standing to object to the release of claims in a class action settlement contradicts this Court's holding in *Devlin v. Scardelletti*, contravenes Rule 23, and deprives petitioner of property without due process of law under the Fourteenth Amendment of the Constitution.

Second, the Eighth's Circuit's decision approving a class action settlement which provides no compensation to a portion of the class conflicts with decisions by the First, Second, Seventh, Eighth, Ninth and Eleventh Circuits.

Third, the Eighth Circuit's decision upholding the "shrinking benefits" feature of this class action settlement endorses a settlement structure which is manifestly unfair and unreasonable for requiring that a class member continue doing business with the defendant indefinitely to obtain the settlement compensation.

I. Denying Petitioner Standing To Object To The Settlement Release Conflicts With The Holding In *Devlin v. Scardelletti*, Conflicts With Rule 23, and Denies Due Process.

Petitioner objected to the settlement as releasing claims which are based on a different factual predicate than the litigated claims. Petitioner's objection was raised under the uniform rule that a class action settlement can only release claims based on the same factual premise as those litigated. *Williams v. GE Capital Auto Lease*, 159 F.3d 266, 274 (CA7

1998) ("identical factual predicate"); *Thompson v. Edward D. Jones & Co.*, 992 F.2d 187, 190-191 (CA8 1993)("realistic identity of issues"); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1288 (CA9 1992)("common nucleus of operative fact"); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 34 (CA1 1991) ("same nucleus of operative fact"); *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (CA2 1982)("identical factual predicate"). The proper way for a class member to preserve claims against the effect of the release is to object to the settlement. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 385 (1996); *Thompson v. Edward D. Jones & Co.*, 992 F.2d 187, 191-192 (CA8 1993) (noting the class member's failure to object to the settlement in finding the preclusive effect of the release to be proper).

The district court did not reach the issue. It held that petitioner did not have "standing to assert the objection as it has not made a claim under § 202." Pet. App. 54a. The Eighth Circuit affirmed this holding without any explanation, stating simply: "[B]ecause Stainless Systems failed to make a claim under either § 201(b) or § 202(a), they [sic] lack standing to object on this ground." Pet. App. 14a ftnt 7.

The right to make a claim is a chose in action. Black's Law Dictionary 258 (8th ed. 2004)("The right to bring an action to recover a debt, money, or thing."). It is a constitutionally recognized property interest possessed by each class action plaintiff. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985).

The decision below contradicts this Court's holding in *Devlin* regarding the standing of class members who object to a settlement. *Devlin v. Scardelletti*, 536 U.S. 1 (2002). The Court stated that the question of a right to appeal did not involve standing under Article III of the Constitution because:

"As a member of the * * * class, petitioner has an interest in the settlement that creates a "case or controversy" sufficient to satisfy the constitutional requirements of injury, causation, and redressability." *Id.* at 6-7 (citing *Lujan* v. *Defenders of Wildlife,* 504 U.S. 555 (1992)). The Court referred to *In re Navigant Consulting, Inc., Securities Litigation,* 275 F.3d 616 (CA7 2001), in which Judge Easterbrook put the point in plain terms: "Class members suffer injury in fact if a faulty settlement is approved, and that injury may be redressed if the court of appeals reverses. What more is needed for standing?" *Id.* at 620. This Court also made it clear that "there is no question" that a class member satisfies the requirements of prudential standing. *Devlin, supra,* at 7.

Petitioner is injured by the improper release of certain claims against defendants. Petitioner investigated and identified specific claims it was prepared to bring. S.A.U.S. 29-38. The cause of this injury is the approval of the settlement and the injury will be redressed if the district court considers the objection and concludes that it has merit. This creates a "case or controversy" sufficient to satisfy the constitutional requirements of injury, causation, and redressability. *Lujan* v. *Defenders of Wildlife, supra*, at 560.

The Federal Rules of Civil Procedure give a class member the right to object to the settlement. "Any class member may object to a proposed settlement * * * that requires court approval under Rule 23(e)(1)(A)." Fed.R.Civ.Pro. 23(e)(4)(A).[3] The Eighth Circuit's holding that petitioner lacks standing effectively amends Rule 23 to create an exception, establishing an additional requirement for an

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[3] The Notice to the class states: [Y]ou can object to any aspect of the proposed settlement ..." S.A. 21, Sect. VII. e.

objection to the release in the settlement. The extensive statutory scheme for the creation of the federal rules "limits judicial inventiveness." *Amchem Prods. Inc. v. Windsor,* 521 U.S. 591, 620 (1997). "Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure "shall not abridge . . . any substantive right." *Id.* (quoting 28 U.S.C. § 2072(b); accord, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 (1999). The right to object is a right to due process under the Fourteenth Amendment to the Constitution. *Phillips Petroleum Co v. Shutts*, *supra* at 811-12; see also *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)(class action must "afford [absent class members] an opportunity to present their objections").

It is important that the right of class members to object to the release in a settlement be upheld. The proper scope of the release is a frequently contested issue in class action settlement approval. Many appeals presenting scope of release issues have reached circuit courts in recent years. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 106-113 (CA2 2005)(release challenged as overbroad; upheld under identical factual predicate doctrine); *Newby v. Enron Corp.*, 394 F.3d 296, 304-305 (CA5 2004)(release upheld against objection it was overbroad); *Staton v. Boeing Co.*, 327 F.3d 938, 961 (CA9 2003)(scope of release indicated unfair settlement; settlement approval reversed); *Reynolds v. Benefit Nat'l Bank*, 288 F.3d 277, 283-284 (CA7 2002)(scope of release indicated unfair settlement; settlement approval reversed).

The decision below is precedential. It is now the law of the Eighth Circuit. "A decision of one three-judge panel within the same circuit is considered binding on other three-judge panels of the circuit ..." 18 *Moore's Federal Practice,* § 134.02[1][a] (Mathew Bender 3d ed.) (citing *United States*

v. Stallings, 301 F.3d 919, 923 (CA8 2002). The district courts within the Eighth Circuit must now apply this rule. *Id.* at §134.02 [2] ("The duty to follow the binding decisions of a higher authority does not depend on the correctness of those decisions."). Thus, this rule will remain the law of the Eighth Circuit until corrected by this Court.

The release in this settlement is very broad. It releases unknown or unsuspected claims. S.A. 158-159. It waives class members' rights under state statutes which provide that a general release does not waive unknown claims. *Id.* Then it goes further and waives class members' rights under state statutes (such as Louisiana Civil Code Art. 3083), or common law, which limit the effectiveness of a release when facts have been **concealed on purpose** by a party to the compromise. *Id.* (emphasis added) The rule established by the Eighth Circuit prevents a class member from objecting to the release of claims that he does not know he has, even if the defendants have been purposely concealing the facts which would disclose the existence of the claim. Due process requires that a class member have the right to object to such a release. "To hold otherwise would deprive nonnamed class members of the power to preserve their own interests in a settlement that will ultimately bind them . . . ." *Devlin*, *supra* at 10.

II. The Eighth Circuit's Approval Of A Settlement Which Provides No Compensation To A Portion Of The Class For A Reason Unrelated To The Merits Conflicts With Other Circuits And Is Manifestly Unfair And Unreasonable.

1. The Decision Below Creates A Conflict In The Circuits.

The decision below clearly describes the "shrinking benefits" feature. Pet. App. 18a – 19a. It states that some class members will receive no compensation because of their failure to continue doing business with Nextel until settlement distribution. *Id.* It then approves this result noting three justifications, but not identifying whether any single one or all three are sufficient to permit this structure. Pet. App. 20a. The first justification is that the "shrinking benefits" is comparable to class members who receive a compensation, but do not use it. *Id.* The second justification is that the settlement notice "sufficiently informed" class members that their compensation was contingent on maintaining business with Nextel. The third justification is that the "shrinking benefits" feature affects only a "relatively small portion of the class." *Id.*

While a district court determination that a settlement is fair, reasonable and adequate is extremely case specific, the decisions of the circuit courts have developed two limitations. The first is that a settlement can not be fair and reasonable if it provides class members no compensation for their release of a claim which has value. The second is that a settlement can not be fair and reasonable if treats similarly situated class members in an unreasonably disparate manner. The decision below fails both of these requirements for fairness.

All circuit courts of appeal which have considered the question have held that a settlement providing no compensation for a reason unrelated to the merits can not be fair. Last year the Seventh Circuit reversed approval of a settlement which provided no compensation to one of two classes. *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 782-783 (CA7 2004). Judge Posner stated that only if the class members' "claims were worthless" could a settlement providing no compensation be fair. *Id.* This year the Second Circuit reiterated its earlier holding that a settlement in which a class member receives no compensation for a valuable claim released by the settlement "could not be fair." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 110 (CA2 2005)(citing *National Super Spuds, Inc. v. New York Mercantile Exchange,* 660 F.2d 9, 19 (CA2 1981)). The Ninth Circuit reversed a class action settlement as unfair under Rule 23(e) where the class members received no compensation for damages claims that were released by the settlement. *Molski v. Gleich*, 318 F.3d 937, 953-954 (CA9 2003) ("Because the consent decree released almost all of the absent class members' claims with little or no compensation, the settlement agreement was unfair and did not adequately protect the interests of the absent class members."). This Court has also noted that release of claims without compensation is a warning signal regarding fairness. In *Amchem* the Court stated that a settlement providing no compensation for certain claims was indicative of a lack of adequate representation for the class. *Amchem Prods. Inc. v. Windsor, supra*, at 627.

The second fairness limitation established by circuit decisions is that a settlement may not treat similarly situated class members differently. *Duhaime v. John Hancock Mutual Life Ins. Co.*, 183 F.3d 1, 5-6 (CA1 1999)("[D]ifferent recoveries for similarly harmed persons who have remained

within the class and are represented by class counsel * * * * can constitute powerful evidence that a fiduciary obligation has not been honored."); *Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1152 (CA8 1999)("[W]e agree that unfairly disparate treatment of class members runs contrary to Fed. R. Civ. P. 23 ..."); *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1148 (CA11 1983)(disparate distribution requires careful judicial scrutiny); *Plummer v. Chemical Bank*, 668 F.2d 654, 660 (CA2 1982)(Upholding disapproval of settlement for disparate relief to named plaintiffs and class members without any merits related justification).

The conflict between the decision below and these cases is not explicit. The Eighth Circuit did not expressly articulate that it is fair and reasonable to provide class members no compensation for a reason unrelated to the merits. But it is very nearly explicit. The decision holds it fair for class members to receive no compensation, and the opinion identifies that the reason for the "shrinking benefits" is failure to do business with Nextel, which is obviously unrelated to the merits. Pet. App. 19a. The decision below attempts to distinguish *Mirfasihi* and *Molski* by saying that "shrinking benefits" does not fail to provide a subclass with a recovery. Pet. App. 20a. That is a distinction without a difference. The settlement here does not call those subject to the "shrinking benefits" a subclass, but it clearly defines them as a group. They are the class members who do not continue doing business with defendants until benefit distribution. The decision below expressly contradicts the rule against disparate treatment of similarly situated class members, though it does not mention the rule. The "shrinking benefits" class members are identically situated to the Class A current subscribers who receive compensation.

The decision holds that providing no compensation is acceptable if class members are informed by the Notice. *Id.* While it is not accurate to say the Notice "sufficiently" informed the class members of this condition[4], it is beside the point. Informing the class of an unfair term of a settlement does not somehow transmute the term into a fair one. Implicit in this justification is the idea that a class member can opt out of the settlement. But this, like most consumer class actions, is a case of modest stakes for individual class members. The Fee during the approximately twenty-one months covered by the action ranged from $0.55 to $1.55 per month per subscriber. Pet. App. 23a. Forcing class members with a modest claim into individual litigation to avoid an unfair settlement term is contrary to one of the central concepts of Rule 23. "Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-339 (1980).

The Eighth Circuit's characterization that affected class members are "a relatively small portion of the class" is of no analytical help. First, the extent of the "shrinking benefits" was not known when the decision issued, and it is not known

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[4] The Notice does not state that current subscribers must continue doing business with defendants to obtain compensation. S.A. 20-21 (Sect. VII. a.). To the contrary it advises: "If you are a member of [the current subscriber class] and wish to participate in the Class Action and receive benefits under the Class Settlement, *you do not need to do anything at this time*. If the settlement is approved, members of [the current subscriber class] will receive the benefits for your Subclass . . . ." (emphasis added) *Id.*

today. It will only be known when the judgment becomes final. Second, the characterization implies that the structure is not acceptable if it affects a relatively large portion of the class. But "relatively small" and "relatively large" are not standards of fairness, they are vague, and to a large degree subjective, conclusions.

The evidence of a subscriber loss rate of 1.5% per month was undisputed. On February 1, 2005, the date the decision below issued, approximately 39% of the 13.7 million member "current customer" class had lost their benefits taking into account the time allowed for this petition, plus the 90 days additional time that defendants have before beginning distribution. There are possible outcomes from this petition which could lead to the loss continuing for a longer period. For instance, a remand to reconsider the standing question in light of *Devlin* would add months more to the period of "shrinking benefits." If the holding on standing is reversed the case will return to the district court to determine whether the release is proper. That will extend the period of "shrinking benefits" to a point where more than 70% of Class A will have lost their benefit.

2. The Decision Below Establishes a Precedent for a Settlement Structure That Is Manifestly Unfair and Unreasonable Under Rule 23(e)(1)(C).

The Eighth Circuit's upholding of the "shrinking benefits" settlement is of exceptional importance because of the new ground it breaks in two respects. It is the first decision to uphold class members receiving no compensation for a reason unrelated to the merits. It is also the first reported decision approving the concept that a settlement can require class members to continue doing business with a defendant service provider in order to obtain the settlement compensation. Both

are manifestly unfair and unreasonable, and if allowed to stand the decision below will encourage a general decline in the fairness of consumer class action settlements.

In most opinions the Rule 23(e)(1)(C) tripartite test of "fair, reasonable and adequate" is conflated to fairness. The Manual of Complex Litigation describes the three elements as addressed to separate aspects of a settlement.

> Fairness calls for a comparative analysis of the treatment of class members vis-à-vis each other and vis-à-vis similar individuals with similar claims who are not in the class. Reasonableness depends on an analysis of the class allegations and claims and the responsiveness of the settlement to those claims. Adequacy of the settlement involves a comparison of the relief granted relative to what class members might have obtained without using the class action process.

Manual for Complex Litigation, Fourth (1st ed. 2004), § 21.62. Petitioner does not question adequacy. The "shrinking benefits" structure fails under the fairness and reasonableness arms of the test.

It fails the fairness test because the victims of "shrinking benefits" get no compensation while former subscribers and the still current subscribers get their benefits. "Shrinking benefits" fails the reasonableness test because the structure responds to class members continuing to do business with the defendants, not to the merits of the class claims. It also fails the reasonableness test because the requirement is unlimited in time. As demonstrated here, it can take a long time. The "shrinking benefits" structure also provides an enormous, undeserved, benefit to the defendants. The district court found

the value of the settlement to Class A or current subscribers to be between $187,000,000 and $231,000,000. Pet. App. 32a - 33a. The "shrinking benefits" structure will save the defendants at least between $75,000,000 and $92,000,000.

The Eighth Circuit said that the "shrinking benefit" victims are comparable to class members who do not use a settlement compensation, like a voucher or check, once they receive it. Pet. App. 19a – 20a. This is a flawed comparison. The class member holding a check or voucher already has their compensation. This is not comparable to requiring a continued business relationship for months or years just to get the compensation.

The protections of Rule 23(e) are critical. As this Court explained in *Amchem*, the inquiry appropriate under Rule 23(e) protects unnamed class members 'from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are unable to secure satisfaction of their individual claims by a compromise.'" 521 U.S. at 623 (quoting 7A Wright *et al* at 518-19) As the Second and Third Circuits have recognized, "It is no secret that in 'seeking court approval of their settlement proposal, plaintiffs' attorneys' and defendants' interests coalesce and mutual interest may result in mutual indulgence.'" *Kaplan v. Rand,* 192 F.3d 60, 67 (CA2 1999)(quoting *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1310 (CA3 1993)).

Class actions are common against businesses which have a continuing financial relationship with class members. These include banks, utilities and telephone companies. If this settlement structure is available those defendants will undoubtedly press for it in all situations, because it is so

clearly in their interests.[5] While they could not expect a 39% or greater reduction of the settlement in every case, even more modest reductions will be a sufficient motivation. In this case the district court issued its approval of the settlement on April 20, 2004. Pet. App. 59a. Adding the 30 days for an appeal, and then the 90 days before the settlement agreement requires the *commencement* of benefit distribution, results in at least 11 months of "shrinking benefits." That is 16%, or 2.2 million class members, of the Class A current subscribers who receive no compensation for a savings to the defendants of at least $29 million. If the decision below stands, class counsel in future cases will be under substantial pressure to accede to that structure as part of a settlement.

III. THE QUESTIONS PRESENTED ARE LINKED.

It is the pursuit of appeals by class members that led to the great impact of the "shrinking benefits" structure in this case. Petitioner has not alone been the cause of this result; there were several other appeals raising different issues. One of them was determined by the Eighth Circuit to be a request for an advisory opinion and rejected on that basis. Pet. App. 11a. However, that appeal alone would have resulted in the delay of benefit distribution until now, resulting in the 30% loss of benefits which has already occurred.

A large portion of the class has been penalized for the exercise by some class members of their right to appeal. Defendants had good reason to expect such appeals. There

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[5] Petitioner's counsel represented class members in objecting to a "shrinking benefits" settlement of a class action against a telephone company in California. DSL Service Litigation, JCCP 4151, San Diego Superior Court. The structure was eliminated by agreement.

were 28 other pending class actions about the Fee against defendants which are extinguished by the release of this settlement. (Docket No. 48-2, 4:02-cv-00921-FJG, Western District of Missouri). Most if not all the other appeals besides petitioner's were by the plaintiffs in other class actions. The defendants constructed a clever settlement structure which would turn the expected challenges to their advantage.

The decision below directly contradicts this Court's ruling on the standing of class members to object to settlements, and it conflicts with circuit court decisions establishing necessary fairness limitations for class action settlements.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Charles D. Chalmers, Esq.
20 Sunnyside Avenue
Suite A #199
Mill Valley, CA 94941-1928

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 04-2298

[March 11, 2005]

In re Wireless Telephone Federal Cost Recovery Fees Litigation,	)
Joseph A. Blando and James Sander, Plaintiffs/Appellees,	)
Nextel Communications, Inc., Nextel West Corp., and Nextel Partners, Defendants/Appellees,	)
v.	)
Stainless Systems Incorporated Class, Member/Objector/Appellant	)

OPINION

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 11, 2005

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 04-2276/04-2285/04-2295/04-2298/04-2303/04-2313

[Filed, February 1, 2005]

In Re: Wireless Telephone Federal Cost Recovery Fees Litigation,	)

OPINION

SMITH, Circuit Judge.

Steven Robertson *et al.* (the Robertson objectors) and other objectors appeal the district court's settlement approval in this multidistrict litigation (MDL) conducted in the United States District Court.[2] The litigation arose out of billing disputes between wireless telephone service providers and their customers. Defendant Nextel Communications, Inc., *et al.* (Nextel), and named class plaintiffs Joseph A. Blando *et al.* (the Blando plaintiffs) eventually agreed to a nationwide class settlement and submitted the terms of the settlement to the district court for approval. Several parties to the MDL

[2] The Honorable Fernando J. Gaitan Jr., United States District Judge for the Western District of Missouri.

action filed objections to the nationwide settlement and the settlement procedure. The district court approved the settlement agreement and several objectors appealed.[3] We now affirm the district court's approval of the nationwide class action settlement.

I. *Background*

Nextel, Cingular Wireless LLC (Cingular), and Sprint Spectrum, L.P. (Sprint), as wireless service providers, charged their customers a "Federal Programs Cost Recovery" (FPCR) fee in order to maintain services mandated by federal law. The providers used the fee to pay for enhanced 911 capabilities (E911), wireless local telephone number portability (LNP), and telephone number pooling capabilities. Federal regulation permits the wireless companies to recoup those costs associated with the services by charging customers a line-item fee. Nextel charged its customers these fees under a line item listed as "Tax, Fees, and Assessments."

Several classes of plaintiffs in various states filed actions challenging Nextel's recoupment of the FPCR costs by this means. The plaintiffs essentially alleged that Nextel impermissibly disguised a rate hike as a tax, fee, or assessment. The Blando plaintiffs, who filed their action in Missouri state court, were on the forefront of this litigation. The Blando plaintiffs' complaint included state law claims for unfair merchandising practices, unjust enrichment, and breach

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[3] Prior to submission of this case, Paul Lamia *et al.* filed a motion to dismiss their portions of the appeal. On October 8, 2001, we granted the motion in accordance with Federal Rule of Appellate Procedure 42(b).

of contract. Nextel vigorously fought to remove these actions to federal court.

Nextel succeeded in removing the *Blando* action to the United States District Court for the Western District of Missouri. The Blando plaintiffs argued that the district court lacked subject matter jurisdiction, and filed a motion in the district court seeking a remand of the case to state court. The district court did not rule on the Blando plaintiffs' removal motion. While the case was pending, the Blando plaintiffs entered into settlement negotiations with Nextel. In the meantime, several other cases filed in various state courts were removed to federal court. Nextel motioned for consolidation pursuant to 28 U.S.C. § 1407. The Judicial Panel on Multidistrict Litigation (JPML) created MDL-1559 finding that:

> All MDL-1559 actions present common, complex legal and factual questions concerning the disclosure and/or propriety of line-item fees charged by wireless telephone service providers to customers for recovering the costs of complying with one or more federally mandated telecommunications programs. Plaintiffs challenge essentially the same billing conduct and seek relief on behalf of frequently commonly defined (if sometimes geographically separate) plaintiff classes.

At the time MDL-1559 was created, *Blando v. Nextel* had proceeded further than any of the other cases. Thus, the Western District of Missouri was called on to preside over MDL-1559. In *Blando*, a proposed settlement had been filed

and Nextel moved for an injunction to stay all related federal and state actions pending approval of the settlement.[4]

After MDL-1559 was formed, the Blando plaintiffs and Nextel settled all claims arising out of the FPCR fee on a nationwide class basis. To ensure the validity of the settlement, Blando filed an amended complaint alleging a federal cause of action so as to make certain federal jurisdiction. The Blando plaintiffs and Nextel then submitted expert reports on the value the proposed settlement would provide to the class members. The district court conducted a

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[4] The district court, in order to protect its jurisdiction over the multidistrict litigation, issued an injunction to prevent other related cases from reaching class certification. The court noted that allowing multiple class certifications against the same defendants based on the same facts could potentially cause serious confusion and chaos. The district court granted an injunction under the All Writs Act, codified at 28 U.S.C. § 1651. On February 12, 2004, plaintiff James Edward Campbell, *et al.* (the Campbell plaintiffs), filed a motion to modify the injunction to be applicable only to the actions pending in federal court against Nextel. The Campbell plaintiffs also filed an appeal of the injunction in this court. That appeal is now moot. After the filing of this appeal, the district court dissolved the injunction. When issues presented in a case "lose their life because of the passage of time or a change in circumstances . . . and a federal court can no longer grant effective relief," the case is considered moot. *Beck v. Missouri State High Sch. Activities Ass'n,* 18 F.3d 604, 605 (8th Cir.1994) (per curiam). We are required by Article III of the United States Constitution to refrain from addressing moot issues that result in advisory opinions. *Haden v. Pelofsky*, 212 F.3d 466, 469 (8th Cir. 2000). Because the district court dissolved the injunction that the Campbell plaintiffs appealed, no controversy remains for ajudication.

fairness hearing and considered objections. After the fairness hearing, Nextel submitted additional evidence *in camera* upon the court's request. Despite several objections, the district court approved the settlement.

The approved settlement creates two classes. Class A is defined as "current" Nextel subscribers who paid the FPCR fee during defined periods. Class A receives free Nextel services, including minutes, text messaging, and phone internet access. Class B is described as former Nextel subscribers who paid the FPCR fee during defined periods but terminated Nextel service prior to September 30, 2003. Because Class B members are no longer Nextel subscribers, they may receive cash reimbursement, a phone card, or a credit if they resubscribe to Nextel. The settlement also requires Nextel to disclose on its bills that the FPCR fee is not a tax but a fee that "Nextel elects to collect to recover its cost of funding and complying with Government mandates and initiatives."

Following the settlement approval, several parties and objectors brought the instant appeal. For sake of clarity, the various parties to this appeal will be referred to by the name of the lead party or objector in the underlying suit.

II. *Discussion*

A. *Jurisdiction*

Daniels and Daniels, PA, *et al.* (the Daniels plaintiffs) now challenges the district court's jurisdiction. The Daniels plaintiffs assert that the district court improperly assumed jurisdiction when the Blando plaintiffs essentially conceded jurisdiction in order to get the settlement approved. The district court below maintained jurisdiction in this case

pursuant to 28 U.S.C. § 1331 as the plaintiffs filed suit under a federal statute, 47 U.S.C. §§ 201(b), 206, 207, challenging the rates charged by various wireless telephone carriers. Lack of subject matter jurisdiction cannot be waived by the parties or ignored by the court. *Hunter v. Underwood*, 362 F.3d 468, 476 (8th Cir. 2004).

We hold jurisdiction was proper in the district court. The Blando plaintiffs initially filed their cause of action in Missouri state court relying solely on state law. Nextel succeeded in removing the case to federal district court based upon federal preemption. Initially, the Blando plaintiffs opposed the removal and sought to have the case remanded to Missouri state court. Then, on the same day that the Blando plaintiffs filed a Motion for Preliminary Settlement Approval, they filed an amended complaint alleging violations of the Federal Communications Act (FCA) under 47 U.S.C. §§ 201(b), 206, 207. The Daniels plaintiffs contend that jurisdiction could not be predicated on the amended complaint, and that the district court should have looked to the face of the original complaint to determine jurisdiction.

It is well-established that an amended complaint supercedes an original complaint and renders the original complaint without legal effect. *In re Atlas Van Lines, Inc.*, 209 F.3d 1064, 1067 (8th Cir. 2000) (citations omitted). Rule 15(c)(2) of the Federal Rules of Civil Procedure allows an amended complaint to relate back when the claim in the amended pleading "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original [complaint]." As such, where a plaintiff has filed an amended complaint, federal courts must resolve questions of subject

matter jurisdiction by examining the face of the amended complaint. *Atlas*, 209 F.3d at 1067.[5]

However, when a district court orders a party to amend its complaint, or when the decision to amend is otherwise involuntary, the question of proper removal must be answered by examining the original rather than the amended complaint. *Atlas*, 209 F.3d at 1067 (citing *Humphrey v. Sequentia, Inc.*, 58 F.3d 1238, 1241 (8th Cir. 1995)). In *Humphrey*, the plaintiff filed a motion to amend his complaint after the district court determined that his state law claims were preempted by federal law. *Humphrey v. Sequentia, Inc.*, 58 F.3d 1238 (8th Cir.1995). We held that such a motion was involuntary because the plaintiff faced the Hobson's choice of amending his complaint or risking dismissal. *Id.* In *Atlas*, we applied *Humphrey* when a district court determined that the plaintiff's claims were preempted and then granted the plaintiff leave to file an amended complaint. *Atlas*, 209 F.3d 1064. There, we explained that the plaintiff was confronted

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[5] See also *Sunkyong Intn'l, Inc. v. Anderson Land & Livestock Co.*, 828 F.2d 1245, 1252 (8th Cir. 1987) (recognizing that an amended complaint can cure a defect in subject-matter jurisdiction); *Carney v. Resolution Trust Corp.*, 19 F.3d 950, 954 (5th Cir.1994) (holding that relation back is appropriate "even when the amendment states a new basis for subject matter jurisdiction"); *Berkshire Fashions, Inc. v. M.V. Hakusan II*, 954 F.2d 874, 887 (3rd Cir.1992) ("Relation back to the date of the original filing applies even when the amendment states a new basis for subject matter jurisdiction."); 6A Charles A. Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice and Procedure*, § 1497, at 94-95 (1990) (explaining that an amendment changes the legal theory on which the action initially was brought is of "no consequence if the factual situation upon which the action depends remains the same and has been brought to defendant's attention by the original pleading").

with a patently coercive predicament in that the plaintiff could either file an amended complaint or risk dismissal of her entire case. *Atlas*, 209 F.3d at 1067.

Daniels urges us to extend the *Humphrey* exception to cases where "jurisdiction is conjured up at the eleventh hour in order to get a settlement approved." We decline. Unlike the situation in both *Humphrey* and *Atlas*, the Blando plaintiffs did not face the choice of amending their complaint or risking dismissal. Here, if the original complaint failed to confer jurisdiction on the federal district court, the Blando plaintiffs faced a distinctly different choice. Specifically, they could either amend their complaint or risk having their case remanded back to Missouri state court. We will not extend the *Humphrey* exception beyond cases where the plaintiff faces dismissal.

In this case, the violations of the FCA alleged in the Blando plaintiffs' amended complaint arose out of Nextel's billing the FPCR fee-the same transaction that gave rise to the Blando plaintiffs' original complaint. Therefore, we hold that the amended complaint properly conferred jurisdiction on the district court to approve the settlement.

B. *Preserving a Right to Appeal*

On appeal, the Robertson objectors seek clarification of whether an objector's right to appeal a settlement is conditioned upon the objector's successful intervention. The Robertson objectors attempted to intervene as named parties in the *Blando* case under MDL-1559. The district court denied intervention and the Robertson objectors filed two motions for reconsideration. They now appeal as "objector-appellants;" that is, they are unnamed members of the *Blando* class who object to the settlement with Nextel.

Specifically, the Robertson objectors rely upon *Devlin v. Scardelletti*, 536 U.S. 1, 153 L. Ed. 2d 27, 122 S. Ct. 2005 (2002), as authority for their right to appeal in a case to which they were never granted status as parties.

The district court in this case concluded that "there is no need for the unnamed class member to be granted intervenor status in order to appeal a decision by [the district court] regarding settlement." We recognize that the Robertson objectors earnestly request clarification of whether intervention is a prerequisite to appeal. However, they fail to challenge any aspect of the district court's approval of settlement in this case. In their reply brief, the Robertson objectors maintain that they are "simply asking this Court to clarify the scope of [*Snell v. Allianz Life Ins. Co. of North America*, 327 F.3d 665, 670 (8th Cir. 2003)(refusing to address the issue when the party in an opt-out case failed to make any objections to the settlement either before the settlement was final or after she was reintroduced to the class)] for the guidance of future objectors lest it become a trap for the unwary." As such, the Robertson objectors are seeking an advisory opinion. We refuse. The Constitution charges Article III courts with the resolution of "cases and controversies," precluding them from rendering advisory opinions. *In re Bender*, 368 F.3d 846, 847-48 (8th Cir. 2004) (citing *Flast v. Cohen*, 392 U.S. 83, 96-97, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968); U.S. Const. art. III, § 2). Accordingly, we are without jurisdiction to address the issues raised by the Robertson objectors.

C. *In Camera Review*

Appellant-objector Steve Strange *et al.*, (the Strange objectors) argues that the district court erred by considering

material submitted to the court by Nextel *in camera*.[6] Blando and Nextel submitted expert opinion evaluations valuing the additional minutes to be accorded class members in the settlement at between $116.5 million and $257 million. The Strange objectors objected to the settlement and specifically challenged the expert opinions received and reviewed by the district court *in camera*.

On January 29, 2004, the district court conducted a fairness hearing on the Blando-Nextel settlement. The court noted that neither the plaintiffs nor the experts properly identified the documents used to reach the settlement. Thus, the court ordered Nextel to provide a listing of the documentation that was provided to the experts, a listing of the personnel who interpreted the data, and affidavits explaining the methodology employed to calculate the minutes. To comply, Nextel filed a listing of the documents under seal for the court to review *in camera*. The Strange objectors filed a motion objecting to the *in camera* evaluation. The court did not rule on that motion, but after an Amended Settlement Agreement was filed on March 8, 2004, the court entered an order dated April 20, 2004, approving the settlement.

The Strange objectors maintain that they were entitled to view the documents submitted to the court by Nextel under

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[6] Richard Thompson *et al.*, (the Thompson objectors) also argue that the district court erred in reviewing settlement evidence *in camera*. In addition, they claim that the district court erred by failing to permit additional discovery in the matter. However, the only evidence that the Thompson objectors claim that they did not get was the evidence submitted *in camera*. As such, the arguments pressed by the Thompson objectors are the same as those presented by the Strange objectors.

seal. The Strange objectors contend they were not afforded an opportunity to make a meaningful response to the settlement without being able to view the documents considered in the *in camera* review. Although the district court did rely on the documents submitted *in camera* to approve the settlement, it never ruled on the Strange objectors' objections. In the absence of specific findings regarding the fairness of the settlement, we must assume that the district court did not abuse its discretion unless the record establishes the contrary. *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1177 (8th Cir. 1995), *cert denied*, 517 U.S. 1156, 134 L. Ed. 2d 648, 116 S. Ct. 1544 (1996) (citing *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 437, 20 L. Ed. 2d 1, 88 S. Ct. 1157 (1968)). Where the district court fails to make findings, we will reverse the district court only if there is no basis upon which it could have found that the settlement is reasonable, or if the settlement is improper as a matter of law. *Id.* The Strange objectors have not met this burden.

We have held due process satisfied where class members received notice of the settlement proposal and were able to argue their objections to the district court. ***See DeBoer,*** **64 F.3d at 1176.** One district court has explained that due process was served where objectors were allowed to view sealed records provided they agreed to be bound by the terms of a protective order. *In re BankAmerica Corp. Securities Litig.*, 210 F.R.D. 694, 706 (E.D. Mo. 2002). The court noted, however, that the objectors have pointed to no authority suggesting that a settlement fails to comport with due process when the record includes documents filed under seal pursuant to a protective order. *Id.*

According to Nextel, the documents reviewed by the district court *in camera* contained only limited information

used to support the declarations already revealed in the public docket. The district court described the documents as merely providing supporting data for the number of Nextel customers who would use bonus minutes as contemplated by the settlement. While the better practice would have been to allow opposing counsel access to the information, we have reviewed the documents under seal and conclude that the Strange objectors suffered no prejudice by the district court's *in camera* review. The sealed portion of the record contains a list of the documentation provided to opposing counsel, the personnel who compiled the data, affidavits of those personnel attesting to the methodology of compiling the data, and conclusions that Nextel maintained could be derived from the data. The Strange objectors were given all the underlying critical information used by the parties to reach a settlement. We conclude that they had sufficient information to challenge the fairness of the settlement and will not reverse on this point.

D. *Overbroad Settlement*

In addition to their jurisdiction argument, the Daniels plaintiffs contend that the district court erred in approving the settlement because it dismissed claims that were not covered in the settlement procedure.[7] The Daniels plaintiffs assert that their claim, based on a double billing of E911 charges in the

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[7] Stainless Systems Incorporated (Stainless Systems) argues that the settlement agreement is overbroad in that it releases claims that were not thoroughly investigated by the Blando plaintiffs. Stainless Systems specifically references claims that could be brought under 47 U.S.C. §§ 201(b), 202(a). Nonetheless, because Stainless Systems failed to make a claim under either § 201(b) or § 202(a), they lack standing to object on this ground.

states of Florida, Illinois and Massachusetts, was never considered in the Blando-Nextel settlement. The Blando plaintiffs limited their complaint to allegations that Nextel failed to disclose that the FPCR fee was not federally mandated and operated as a concealed rate increase. The thrust of the Daniels plaintiffs' argument is that Nextel recovered once for FPCR from billing its customers and a second time from the three states. The district court concluded that the E911 fees had nothing to do with the FPCR fee and, thus, such claims did not merit disapproval of the settlement.

The Daniels plaintiffs seek to recover only a portion of the FPCR fee that they contend "double dipped" by charging it in conjunction with the E911 fee. Nextel explains that there are two phases of the E911 charge, and that the FPCR charge only relates to Phase II of E911, which Nextel never recovered independently from the states. The settlement in this case covered any and all future claims "which relate in any way to the FPCR fees." The Daniels plaintiffs assert a claim that is predicated on the billing of FPCR fees, the same factual predicate supporting the Blando case. As such, the settlement necessarily includes the claims of the Daniels plaintiffs. The claims asserted by the Daniels plaintiffs is therefore properly controlled by the settlement of the entire FPCR billing.

In their reply brief, the Daniels plaintiffs assert that a separate and distinct harm from the deceptive FPCR charges was salient under various state laws. To that extent, the Daniels plaintiffs argue that, in addition to the settlement of the FPCR billings, they would have been able to recover the following:

(1) In Illinois - Economic and putative damages;

(2) In Florida - Damages, attorneys' fees, and costs; and

(3) In Massachusetts - injunctive relief and up treble damages.

We recognize that when recovery depends on various forms of state law, class treatment may be inappropriate. *See In re Mexico Money Transfer Litig.*, 267 F.3d 743 (7th Cir. 2001). Nonetheless, the Daniels plaintiffs assert these claims for the first time in a reply brief. Claims not raised in an initial brief are waived, and we do not generally consider issues raised for the first time on appeal in a reply brief. *Pro Tech Indus., Inc. v. URS Corp.*, 377 F.3d 868, 869 (8th Cir. 2004).

E. *Fair, Reasonable, and Adequate*

The remaining issues raised by objectors contend that the approved settlement is not fair, reasonable, and adequate. Under Federal Rule of Civil Procedure 23(e), the district court acts as a fiduciary, serving as a guardian of the rights of absent class members. *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir.1975). In light of the exposure to the litigants and litigation, we review a district court's approval of a class action settlement for an abuse of discretion. *In re BankAmerica Corp. Secs. Litig.*, 350 F.3d 747, 751-52 (8th Cir. 2003); *In re Int'l House of Pancakes Franchise Litig.*, 487 F.2d 303, 304 (8th Cir. 1973).

A district court is required to consider four factors in determining whether a settlement is fair, reasonable, and adequate: (1) the merits of the plaintiff's case, weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement. *Grunin,* 513 F.2d at 124 (citations omitted); *see also Van*

Horn v. Trickey, 840 F.2d 604, 607 (8th Cir. 1988). The district court need not make a detailed investigation consonant with trying the case; it must, however, provide the appellate court with a basis for determining that its decision rests on "well-reasoned conclusions" and is not "mere boilerplate." *Van Horn*, 840 F.2d at 607 (citations omitted). The most important consideration in deciding whether a settlement is fair, reasonable, and adequate is "the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1150 (8th Cir. 1999) (internal quotations omitted).

In this case, the district court entered a detailed order evaluating the strength of the class claims against the strengths of Nextel's defense in conjunction with the features of the settlement offer. The district court ultimately determined "that the outcome of the litigation would be far from certain." We cannot say that such a factual determination is an abuse of discretion. After reviewing calculations by two economists, the district court determined that the value of the settlement would be between $164,467,645 and $256,952,181. The range in value recognized that some Nextel subscribers would not use bonus minutes and the value of each minute ranged from $.10 per minute to $.35 per minute. In addition, the settlement called for prospective equitable relief in the form of additional disclosure requirements in connection with Nextel's FPCR fee advertising and billing practices. Weighing the uncertainty of relief against the immediate benefit provided in the settlement, we conclude that the district court acted within its discretion when considering the strength of the claims and the amount of the settlement.

As to the second factor, there is no indication that Nextel's financial condition would prevent it from raising the

settlement amount. Regarding the third factor, the district court considered the time interval before any individual class member would be afforded redress. Nextel mounted a formidable defense in this nationwide class action subject to the delays and complexities associated with multidistrict litigation. Indeed, this case had yet to complete discovery, much less the inevitable appeals that would have been necessary before a final resolution. The district court properly explained that, barring settlement, this case would "likely drag on for years, require the expenditure of millions of dollars, all the while class members would receive nothing." Lastly, while the briefing in this appeal would indicate otherwise, the amount of opposition to the settlement is minuscule. The district court concluded that only .00068% of the class objected to the settlement and only .0024% of the class opted out. Clearly, the number of objectors in this case fell well below the four percent of objectors paraded in *Petrovic*. The district court has a duty to the silent majority as well as the vocal minority. *DeBoer*, 64 F.3d at 1178. While we agree that these vocal objectors should also be considered, we do not believe that disapproval of the settlement is warranted in this case. *See Petrovic*, 200 F.3d at 1152.

F. *The Shrinking Benefits Objection*

The final objection to the fairness of the settlement has been characterized as a "shrinking benefit." Under the construct of the settlement, certain class members are potentially precluded from recovering any benefits. Specifically, according to Stainless Systems, any person who terminates service with Nextel after September 30, 2003, but before distribution of the settlement, will not receive any benefit. This "void" occurs because the settlement bifurcates the class members. Class A is defined as "current" class members and gives benefits in the way of free Nextel service-

minutes, text messaging, and phone internet access. Class B is described temporally as those persons who terminate Nextel service prior to September 30, 2003. Because persons in Class B are no longer Nextel subscribers, they get a credit (if they resubscribe to Nextel), cash reimbursement, or a phone card. Thus, according to Stainless Systems, a class member that cancels Nextel service after September 30, 2003, but before benefits are distributed, forfeits his or her benefits under the settlement agreement. Stainless Systems argues that those class members do not fit into either a classification as a "current" customer or a customer who cancelled service prior to September 30, 2003.[8] In response, Nextel contends that the discrete members of the class who cancel service after September 30, 2003, but before benefits are distributed are no different from other members in a settlement who elect not to claim their settlement benefits. Nextel compares this set of class members to those who elect to discard or sell a product rather than take advantage of free repairs, class members who

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[8] The record fails to disclose whether Stainless Systems cancelled service with Nextel after September 30, 2003. Nonetheless, Stainless Systems maintains standing to pursue this claim because they argue that they are being coerced into keeping Nextel as their cellular provider. Specifically, Stainless Systems argues that under the settlement agreement, it must maintain service with Nextel until distributions are awarded in order to recover under the settlement. As such, Stainless Systems argues that it can either stay as a customer and recover under the settlement, or it can cancel service and forfeit any recovery. Stainless Systems' allegations constitute sufficient injury in fact to satisfy the standing requirements of Article III. *See Bennett v. Spear*, 520 U.S. 154, 168-69, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997) (explaining that a harm "produced by determinative or coercive effect" upon a third party satisfies the injury in fact requirement when the harm is "fairly traceable" to that effect).

elect not to submit claim forms, or Class B members from the current settlement who elect not to cash a distributed check. We agree.

We have recognized that a class action settlement is a private contract negotiated between the parties. *Christina A. ex rel. Jennifer A. v. Bloomberg*, 315 F.3d 990, 992 (8th Cir. 2003). Rule 23(e) requires the court to intrude on that private consensual agreement merely to ensure that the agreement is not the product of fraud or collusion and that, taken as a whole, it is fair, adequate, and reasonable to all concerned. *Id.* Stainless Systems failed to provide a convincing argument to support the reversal of a reasonable settlement based solely on the fact that some members of a subclass may not receive benefits. This is not a case where the settlement failed in its entirety to provide a subclass with recovery. *See, e.g., Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781 (7th Cir. 2004); *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003). Here, the settlement notice sufficiently informed members of Class A that their recovery was potentially contingent upon maintaining service with Nextel. This potential contingency affecting a relatively small portion of the class is insufficient to render the settlement patently inadequate, unfair or unreasonable.

III. *Conclusion*

For the foregoing reasons, we affirm the district court's order approving the proposed settlement.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

[April 20, 2004]

In re Wireless Telephone Federal Cost Recovery Fees Litigation	)

OPINION

FINDINGS OF FACT

Fernando J. Gaitan, Jr.

A. Plaintiffs' Claims

1. Joseph A. Blando and James Sanders ("Plaintiffs" or "Class Plaintiffs") filed this class action on August 23, 2002, in the Circuit Court of Jackson County, Missouri, on behalf of a nationwide class consisting of individuals and entities that purchased cellular or wireless telecommunications services from Nextel and who were charged a "Federal Programs Cost Recovery" ("FPCR") fee on their monthly bills.

2. The Nextel Defendants, removed the case to this Court on September 27, 2002. Plaintiffs filed a timely Motion to Remand.

3. After removal and prior to the Court's ruling the Motion to Remand, Plaintiffs and Nextel conducted discovery, after which Plaintiffs sought leave to file a First Amended Complaint. This Court sustained Plaintiffs' Motion.

4. The First Amended Complaint avers that Nextel West Corp., Nextel Communications, Inc., and Nextel Partners, Inc. (together "Nextel") misled customers by placing the FPCR fee under a bill category called "Taxes, Fees and Assessments" and that the FPCR fee was an attempt by Nextel to hide a rate increase. The Plaintiffs averred that Nextel's actions misled its subscribers into maintaining their service with Nextel and improperly discouraged them from comparing their true rates with the rates charged by Nextel's competitors. Plaintiffs' First Amended Complaint averred that Nextel breached its contracts with its subscribers, was unjustly enriched, committed consumer fraud under Mo. Rev. Stat. Chapter 407 and similar consumer protection laws across the United States and violated 47 U.S.C. § 201(b).

Nextel's Notice and Response to the Blando Action

5. Nextel's December, 2001 notice to its subscribers sent prior to Nextel initially charging the FPCR fee informed the subscribers that the FPCR fee would be used to fund E-911 service (a service that would permit the recipient of a 911 call from a Nextel phone to know the exact location from which the call was made in order to aid law enforcement and emergency personnel in responding); wireless number portability (a feature that would permit cellular phone subscribers to keep the same cellular phone number even when they switched cellular phone service providers) and number pooling (a practice designed by the FCC to limit the number of telephone numbers that would be required to service all telephone service in the United States). The notice

did not inform Nextel customers that the FPCR fee was not a tax and was not mandated by the federal government, despite the intended inclusion of the FPCR fee in a bill section entitled "Taxes, Fees and Assessment."

6. In August, 2002, Nextel decided to raise the FPCR fee from $ .55 per month to $1.55 per month. At that time Nextel had prepared a new notice setting out the amount of the FPCR fee increase. The new notice did not tell Nextel's subscribers that the FPCR fee was not a tax and not mandated by the federal government.

7. Following the filing of the Blando action, Nextel amended its notice to its customers informing them that it was raising the FPCR fee to $1.55 effective November, 2002 and specifically informing those customers that the FPCR fee was not a tax and not a federally mandated charge. Nextel sent its new notice so informing its customers in September and October, 2002, prior to the filing of any other action against Nextel by any other governmental entity or private person.

B. Other Actions Against Nextel

8. The Missouri Attorney General filed an action against Nextel on behalf of Missouri consumers on December 2, 2002. State ex rel. Nixon v. Nextel West, Circuit Court of the City of St. Louis, Missouri, Cause No. 024-02609A.

9. Other persons or entities filed actions against the Nextel defendants. The first of which was not filed until February 21, 2003, (Hohne v. Nextel West Corp., No. CV 03 494803, Ohio Court of Common Pleas, Cuyahoga County) nearly six months after Messrs. Blando and Sanders filed this action. Generally speaking, these follow-on actions alleged similar

causes of action against the Nextel defendants as were alleged by Class Plaintiffs.

10. The Nextel corrective notice (P7) was sent to Nextel customers beginning four months prior to the filing of any of the follow-on actions filed against Nextel by any of the Objectors.

11. On July 3, 2003, Nextel and the Missouri Attorney General reached a settlement of the Missouri Attorney General action. Nextel agreed to prospective relief including advertising disclosures in its Missouri advertising and information about the FPCR fee in its bills to Missouri customers. The Missouri Attorney General did not obtain any relief for Nextel customers in the way of refunds or any other benefit and did not obtain any relief for persons outside of Missouri. Nextel denied any liability as part of the Missouri Attorney General Settlement.

12. On November 13, 2003, the Judicial Panel on Multidistrict Litigation ordered similar cases against Nextel and other wireless carriers who charged a similar fee transferred to this Court for pretrial proceedings.

C. Discovery and Settlement Negotiations

13. Settlement negotiation in this case did not begin until discovery by Class Plaintiffs was completed.

14. Class Plaintiffs propounded appropriate discovery requests to Defendants seeking information by interrogatory and requests for production of documents. Nextel produced over two thousand pages of documents, including information concerning the reasons for the imposition of the FPCR fee, the communications from Nextel to its customers, the amount

of money raised by the FPCR fee and the uses to which Nextel put the funds raised through the fee, relevant customer billing records, customer complaints, Nextel's planned responses to customer complaints, Nextel's advertising of the fee, project plans, and other information relevant to the creation, implementation and communication concerning and uses of the FPCR fee.

15. On September 8, 2003, Class Plaintiffs took a 30(b)(6) deposition of Nextel's executive in charge of the FPCR program. The Court has reviewed that deposition and determined that the deposition was contested and that Class Counsel questioned the company about all aspects of the FPCR fee, including its beginning; the federal programs addressed by the fee; Nextel's compliance with those programs; the placement of the fee in Nextel's bills to customers; the choice of wording describing the fee; additional communications by Nextel to customers explaining the fee; the costs Nextel has incurred in complying with the federal programs at issue; and the amounts Nextel has recouped under the fee.

16. Some objectors assert that the parties reached settlement without adversarial discovery (*see, e.g.*, Dynamic Network Support, LLC, Daniel Ferazzoli, and Desiree T. Mack's Objections, dated Dec. 23, 2003 (hereinafter "Dynamic Network Obj.") at 12; Objections of Class Members Steven Robertson, Diane Hohne, Steve Strange, Christopher Freeman, Susan Martelli, Joseph Martelli, and Rolando Prado, dated Dec. 24, 2003 (hereinafter "Robertson Obj.") at 5). The Court finds that these objections are not well taken. The Court further finds that the discovery provided Class Counsel concerning the FPCR fee at issue, all documents pertaining to Nextel's decision to impose that fee, and the opportunity to question a Nextel corporate

representative at deposition, all prior to negotiation of the settlement, provided Class Counsel with sufficient information to negotiate and conclude a fair, reasonable and adequate settlement.

17. Following discovery, the parties engaged in negotiations concerning the possibility of settlement. After two negotiating sessions failed to yield an agreement, the parties participated in an all-day mediation session on September 22, 2003, in Kansas City, Missouri, at which a former Missouri Supreme Court Justice, the Hon. Ann Covington, served as mediator. The mediation broke down without reaching a settlement agreement. Subsequent negotiations reached a proposed Settlement Agreement.

18. The parties presented the Proposed Settlement Agreement to the Court on October 3, 2003, seeking preliminary approval. The Court consulted with the parties by telephonic conference, ordered minor changes in the Agreement and entered its October 9, 2003 Order Granting the Joint Motion for Preliminary Approval of Class Action Settlement, Provisional Class Certification and Authorizing Dissemination of Notice to Class Members. Pursuant to that Order, notice was sent to potential class members, notifying all class members of the Settlement Agreement, the date of the Court's Fairness Hearing, and the deadline for filing objections.

D. The Settlement Agreement

19. The Settlement Agreement resolves all class members' claims, including attorneys' fees and costs. Attorneys' fees are not payable from funds due Class Members but are payable by Nextel alone.

20. The Settlement Agreement creates two damage classes: Class A consists of current Nextel subscribers; Class B consists of former Nextel subscribers who paid the FPCR fee during the class period.

21. The subclasses in Class A are based on the level of notice Nextel provided at the time a class member subscribed. Current subscribers are distinguished according to the dates when Defendants modified and supplemented their disclosures about the fee for the purpose of determining an award of damages. Class A members will automatically receive their benefits.

22. Class B members must claim their benefits by filing a proof of claim form.

23. This is not a "coupon" settlement. Class members will not be required to purchase any additional services or items to receive a benefit or cash payment.

24. **Subclass A.1** consists of current subscribers who paid the FPCR fee from its inception in January 1, 2002 through November 30, 2002, the date by which all Nextel subscribers had received notice from Nextel that the FPCR fee was not a tax and not mandated by the federal government. This subclass, members of which paid the FPCR fee before Nextel informed its subscribers that the FPCR fee was not a tax and not a mandated fee of the federal government, consists of approximately 8.6 million units[1]. Class A.1 subscribers paid

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[1] The average Nextel account holder (the person or entity who contracts with Nextel) has three units (the hand held telephone). Thus, notice in this case went to approximately 4.8 million account holders and former account holders who represent approximately 17

from $15.50 to $22.50 in FPCR fees, depending on when their service subscription began within the defined range. Each A.1 subscriber receives 60 anytime minutes per unit.

25. **Subclass A.2** consists of current Nextel subscribers who became Nextel subscribers after November 30, 2002, but before March 29, 2003, and who paid the FPCR fee after Nextel had informed subscribers that the FPCR fee was not mandated by the federal government and not a tax. This class consists of approximately 1.75 million units. Class A.2 members paid from $9.30 to $15.50 in FPCR fees and will receive 30 bonus minutes per unit.

26. **Subclass A.3** consists of current subscribers who became customers on or after March 29, 2003 and who paid the FPCR fee until September 30, 2003. This class consists of approximately 2.7 million units. Members of this subclass subscribed after Nextel began compliance with the injunctive relief obtained in the settlement of the case filed by the Missouri Attorney General. Class A.3 members paid from $1.55 to $9.30 in FPCR fees and will receive 27 minutes of bonus anytime minutes per unit.

27. **Subclass A.4** consists of current Nextel subscribers who have purchased unlimited telephone time, and who paid the FPCR fee. These approximately .56 million units will receive 100 two-way text messages or one month's free connection to the internet per unit. The subscribers paid from $1.55 to $22.50.

28. Under the first paragraph of the Terms and Conditions of the Nextel Subscriber Agreement, Nextel reserved the right

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million current and former Nextel units.

to "change this Agreement at any time... ." The Nextel subscriber had the option, upon notification of the change to "terminate Services as of the effective date of the change(s) by submitting written notification to Company prior to the effective date" of the changes. "If Customer elects to use the Services or make any payment to Company on or after the effective date of the changes, Customer is deemed to have accepted the change(s)." Class B subscribers are divided into two subclasses.

29. **Class B** consists of former Nextel customers.

30. **Subclass B.1** consists of Nextel customers who terminated their service within thirty days of the notices sent by Nextel in January 2002 and October 2002, who had paid the FPCR fee, who paid the early termination fee of $200.00, and who informed Nextel either orally or in writing that they were terminating the Nextel services for reasons related to price. Nextel has waived the contractual notification in writing requirement for the 70,000 potential members[2] of this subclass as a part of this settlement. Any person who properly fits within the definition of subclass B.1 will receive a full cash refund of the $200 early termination fee ("ETF") they paid.

31. **Subclass B.2** consists of former Nextel subscribers who terminated their Nextel services during the period from

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[2] Nextel records show that 70,000 persons terminated service with Nextel in the thirty day period following the January 2002 imposition of the fee and October 2002 fee increase and mentioned price as the reason for the contract termination. Of those 70,000 fewer than 5,000 paid the $ 200 early termination fee. The exact number is not accurately known and will depend on claims made by former customers.

February 1, 2002 to September 30, 2003 and who are not members of the B-1 class. Many of these approximately 4.2 million former subscribers were month-to-month customers who had no existing contract with Nextel. Many simply let their contracts expire and moved to other carriers. The remainder terminated their contracts for reasons other than an amendment to the contract. Members of subclass B.2 receive a choice of benefits. If they want to return as Nextel customers, they receive a waiver of the $35 activation fee and 30 additional minutes of free cellular service (the same benefits as A.2 receive). If a B.2 member does not wish to come back to Nextel, the member will receive a long distance calling card good for thirty free minutes of long distance to be used at any time from any telephone.

32. The Agreement for which the Court orders Final Approval provides for additional, post-settlement discovery pursuant to the Federal Rules to permit Class Counsel to assure Class Members and the Court that Nextel has provided the benefits it has agreed to provide. The Agreement also provides a financial incentive for Class Counsel to obtain such assurances by withholding payment of twenty-five percent of Class Counsel's fees until the confirmatory discovery is completed and this Court receives a report from Class Counsel setting out the results of that confirmatory discovery.

33. The Agreement also provides for binding resolution of disputes concerning claims by Class Members that Nextel failed to provide class benefits. The Agreement expressly appoints Orran L. Brown, an independent individual, an attorney and a person experienced in major class action administration as the final arbiter of disputed claims. Claims by certain objectors that the claims resolution process leaves Nextel with sole, unfettered discretion to determine if a claim is valid are incorrect. The Agreement memorializes the

assurances provided the Court at the Fairness Hearing by Class Counsel and Nextel that a neutral, binding dispute resolution process was contemplated by the parties as part of the Settlement.

34. The Class Plaintiffs provided the Court with declarations of two economists concerning the value of the settlement to the Class Members. These economists' declarations were based on affidavits from Nextel employees setting out Nextel customers' usage of bonus minutes and Nextel customers' historic patterns of over-contract-usage. Following the Fairness Hearing, the Court sought additional information from Nextel setting out the bases for the Nextel employees' affidavits used by the Class Plaintiffs' experts. The Court's independent review of that information leads the Court to conclude that information upon which the Class Plaintiffs' experts based their declarations was reliable, statistically sound, and provided a sufficient statistical basis for the Class Plaintiffs' experts' declarations.

35. The Court finds that Nextel customers who use more than their contracted for minutes in a given month are charged a minimum of $.35 per minute for each minute used over the contracted for number of minutes. The Court further finds that approximately 40% of all Nextel customers use more than their contracted for minutes in any given month.

36. The Court further finds that approximately 80% (79.3%) of Nextel customers who are given free minutes by Nextel, whether as an incentive to extend their Nextel contracts, to satisfy a complaint the customer has with Nextel or as an incentive to become a Nextel customer, use the additional or bonus minutes Nextel provides.

37. Based on these costs, the individual value to Class members calculated at $ .35 per minute, the cost of a minute used over the contracted for amount, is as follows:

1. Class A-1: $ 21.00

2. Class A-2: $ 10.50

3. Class A-3: $ 9.45

4. Class B-1: Full reimbursement

5. Class B-2: $ 45.50 to $ 2.10

38. The economists based their class value calculations on four models. Dr. Edward Robb based his models on three separate assumptions. The first model is calculated on the assumption that 100% of the Class A members would use of their free minutes. The second model assumed that only 40% of the Class A members would use free minutes. The third model assumed that 80% of the Class A members would use the free minutes. Dr. Robb assumed that all minutes had a value of $ .35 per minute. Dr. James Burt used a blended model that accounted for likely usage of the free minutes based on the same Nextel historic usage date, but discounted the value based on the fact that some minutes would be valued at $.35 per minute and some should be valued at $ .10 per minute as prepaid minutes.

39. The Court finds based on the evidence that the value of the benefits to the Class members falls within a range as follows:

1. Class A-1: $180,724,530 to $ 71,024,740

2. Class A-2: $18,437,496 to $ 7,245,936

3. Class A-3: $26,349,926 to $ 10,355,521

4. Class A-4: $5,646,470[3]

5. Class B-1: $200 per class member

6. Class B-2: $8,917,024

40. The total value of the settlement is from $ 256,952,181 to $164,467,645.

41. The Agreement also requires Nextel to extend the notification provisions of the Missouri Attorney General Settlement on a nationwide basis. This prospective relief is essentially what Plaintiffs requested in their Complaint.

E. Dissemination of Notice to the Class Members, Class Member Response, Fairness Hearing

42. Pursuant to the Court's Order, Defendants mailed the Notice of Pendency of Class Action, Proposed Settlement, and Hearing to the last known address of all Settlement Class members. Nextel also hired a postal forwarding service to obtain the most accurate addresses of former Nextel subscribers from the National Change of Address database. Substantially all Notices were sent by the Court's November

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[3] Class A-4 benefits are not free minutes but a choice between 100 free text messages, valued at $ .10 per message or one month's free Nextel internet access, valued at $ 29.99. This figure assumes that all of the class A-4 members - 556,647 units will elect the lowest cost benefit.

19, 2003 deadline. *See* Nov. 4, 2003 Order at 1.[4] The Notice also was published twice in a daily edition of *USA Today* -- on November 19, and again on November 26, 2003. *See id.* at 1-2. In addition, Class Counsel made a toll-free number available for persons having questions about the notice and the settlement and created an internet web site that provided additional information about the settlement and answered frequently asked questions. Class Counsel also responded to e-mail questions and comments sent to the e-mail address provided class members on the web site and on the toll-free telephone line.

43. The Court finds that at the time of the Fairness Hearing there were 4,838,739 million Nextel account holders representing 13,715,881 customer units in Class A and approximately 4,246,440 customer units in Class B.

44. The Court finds that only 33 persons or entities, or 0.00068%, objected to the Settlement Agreement. Only 620, or 0.0024%, of current or former Nextel subscribers have elected to opt out of the Settlement Class.

45. The Court conducted its Fairness Hearing on January 29, 2004. At that hearing counsel representing Class Plaintiffs and counsel representing Defendants Nextel and Nextel Partners presented arguments in support of final approval of the proposed class action settlement. No objectors appeared in person, but counsel for several objectors made presentations to the Court. All objectors were afforded the

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[4] After manually researching certain accounts to correct address errors, Nextel performed an additional mailing of less than 200 notices on November 20, 2003. In addition, Nextel Partners performed a second mailing on November 26 through December 1, 2003, in order to correct certain typographical errors in its notice.

opportunity to present their objections to the Court at the Fairness Hearing. At the conclusion of the Fairness Hearing, the Court permitted filing of supplemental objections and responses thereto by Class Plaintiffs and Defendants. (Transcript of Fairness Hearing Jan. 29, 2004) (Tr. at 78-80). The Court also required Nextel to provide additional information setting out factual and statistical bases for the bonus minute usages upon which Class Plaintiffs economists relied in reaching their conclusions about the value of the settlement.

F. Class Representatives

46. The Court finds that class representatives Blando and Sanders were Nextel customers during the relevant time period.

47. The Court finds that class representatives' bills from Nextel were typical of the bills sent to Nextel Customers who were charged the FPCR fee in that each bill imposed the FPCR fee and imposed that fee under a section of the Nextel bill entitled "Taxes, Fees and Assessments."

48. The Court finds that class representatives paid the FPCR fee that is at issue in this case during the relevant time period.

49. The Court further finds that Class Plaintiffs were engaged in the conduct of the case, including approving the negotiated settlement.

CONCLUSIONS OF LAW

A. The Class is Certified

50. The Court concludes:

a. The class of users and/or purchasers of wireless telecommunication goods and services from Nextel is so large that joinder of all members is impracticable;

b. There are questions of law and fact that are common to the entire class;

c. The claims of the Class Members regarding the notice provided Class Members and Nextel's placement of the FPCR fee on its bill under a section entitled "Fees, Taxes and Assessments" are typical of the claims of the class;

d. The class representatives were fairly chosen and adequately and fairly represent the entire class of persons or entities who were charged the FPCR fee from January of 2002 until September 30, 2003;

e. Prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for Nextel or adjudications with respect to individual members of the class would, as a practical matter, be dispositive of the interests of the other members not a party to the adjudications or substantially impair or impede their ability to protect their interests;

f. Nextel has generally acted or refused to act on grounds applicable to the entire class, thereby making appropriate both the benefits awarded under the Settlement Agreement and the final injunctive relief with respect to the class as a whole set out in the Settlement Agreement; and

g. The questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available means of administration.

The factual and legal issues linking the class members is substantially related to the resolution of the litigation making class certification appropriate. See DeBoer v. Mellon Mortgage Co., 64 F.3d 1171, 1174 (8th Cir. 1995).

B. Standard of Review under Fed. R. Civ. P. 23

51. A class action shall not be dismissed or compromised without the approval of the court. Fed. R. Civ. P. 23(e). Under Rule 23(e), "'the district court acts as a fiduciary which must serve as a guardian of the rights of absent class members'." In re Texas Prison Litigation, 191 F.R.D. 164, 172 (W.D. Mo. 1999) (quoting Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir. 1975)). The recent revision to Rule 23(e)(1)(C) does not allow the Court to approve a settlement unless a hearing has been held to determine whether the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(1)(C). The recent amendments to Rule 23 do not significantly alter the role of a district court in the Eighth Circuit in ruling on a motion to approve a class action. Eighth Circuit law has long required that any class action settlements be "fair, reasonable, and

adequate." In re Texas Prison Litigation, 191 F.R.D. at 172 (citing Grunin, 513 F.2d at 120).

1. Settlements of Class Actions are Favored under the Law.

52. This Court is well aware of the long policy of encouraging settlement. In Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., 921 F.2d 1371, 1383 (8th Cir. 1990), it was held that "the law strongly favors settlements...[and] courts should hospitably receive them." The policy in favor of settlement is so strong that such agreements are "presumptively valid." Id. at 1391. In considering the terms and conditions of the settlement against this background strongly favoring settlement, "judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel." Petrovic v. Amoco Oil Co., 200 F.3d 1140, 1148-49 (8th Cir. 1999) (citing Armstrong v. Board of School Directors, 616 F.2d 305, 315 (7th Cir. 1980)).

C. Proper Notice of the Class Action Settlement Agreement Was Given.

53. "'Notice of a settlement proposal need only be as directed by the district court, Fed. R. Civ. P. 23(e), and reasonable enough to satisfy due process'." DeBoer v. Mellon Mortgage Co., 64 F.3d 1171, 1176 (8th Cir. 1995) (quoting Grunin, 513 F.2d at 120-122). The standards encompassed under the notice requirement of Rule 23(e) require that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections'." Petrovic, 200 F.3d at 1153 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L. Ed.

865, 70 S. Ct. 652 (1950)). There is no one "right way" to provide notice as contemplated under Rule 23(e). However, there is no question that individualized notice by mail to the last known address is the best notice practicable in a class action. Grunin, 513 F.2d at 121 (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974)).

54. In this case, the Court approved individualized notice by mail to the potential settlement class members' last known address. Defendants then used the National Change of Address database to verify that these potential class members received the notice that was sent. Furthermore, for those who might be missed by this undertaking, defendants published the notice of the class action settlement two times in *USA Today*, a paper with national circulation. The notice provided by the defendants pursuant to the terms of the Proposed Settlement Agreement as approved by this Court was the "best notice practicable" and far exceeds the minimum standard necessary for adequate notice under Mullane.

55. At least one objector, Dynamic Network, has complained that the notice was sent to the last known addresses based on the defendants' records without any follow-up. This objection has no merit since well established law provides that notice to the last known address is the "best practicable notice." Further, use of the National Change of Address database shows the means and methods used by the parties to get this notice to the settlement class members. Furthermore, mail forwarding was also used to ensure the notice was properly received by those effected by the Agreement and return-mail services and mail-forwarding were used for any mail that was undeliverable as addressed. In addition, similar arguments to those advanced by Dynamic Network have been made in other class actions and rejected.

See *Grunin*, 513 F.2d at 121-122; see also *Weinberger v. Kendrick*, 698 F.2d 61, 71 (2d Cir. 1982).

56. Other objectors mistakenly claimed that notice in defendants' customers' monthly bills will be confusing and misleading to customers. This objection completely misses the mark since notice was mailed out separately in envelopes marked "IMPORTANT OFFICIAL CLASS ACTION DOCUMENTS ENCLOSED," or **"Important: Class action settlement enclosed."** The Court finds this notice was sufficient to make customers aware of the settlement, their rights under Rule 23 and the nature of the settlement.

57. Some objectors voiced concern that the Court approved notice was too complex and confusing. This Court finds the notice it approved was not overly complex, but clearly and adequately spelled out the benefits the class members are entitled to depending upon which class(es) they may have fallen into. See 3 Newberg on Class Actions § 8.32 (4th ed. 2002).

D. The Settlement is Fair, Reasonable, and Adequate

58. "The single most important factor in determining whether a settlement is fair, reasonable, and adequate is a balancing of the strength of the plaintiff's case against the terms of the settlement." *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988). *See also Petrovic*, 200 F.3d at 1150; *Grunin*, 513 F.2d at 124; In re Texas Prison Litigation, 191 F.R.D. at 172.

1. The Merits of the Plaintiffs' case Balanced Against Benefits of the Settlement

59. In essence, plaintiffs claim that defendants' use and labeling of the FPCR fee is misleading and an unfair practice in violation of Section 201(b) of the Federal Communications Act. More specifically, plaintiffs claim that the charge was misleading since it was titled as a "federal" charge when, in fact, it was not a federal charge, but a mere cost recovery measure voluntarily imposed on defendants' customers by defendants. Plaintiffs claim that the title of the charge, along with its placement on the customers' bills under the "Taxes, Fees, and Assessments" section led customers to believe that this was a federally imposed charge akin to a tax. Customers were damaged, plaintiff's theory goes, since they were led to believe that there was no use to go to another cellular provider to avoid this charge since, as a "federal" charge, all cellular providers would be imposing it. Therefore, customers continued to pay the charge without question or without leaving defendant for another provider and, accordingly, lost a right to terminate their contract.

60. Defendants counter with many defenses. First, they claim, that the FCC specifically provides that it is proper to recover costs it is forced to endure for complying with mandatory system upgrades like E911, WNP, and number pooling. See In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Sys., 11 F.C.C.R. 18676 at P11 (1996) and 14 F.C.C.R. 20850 at P20 (1999). Second, defendants argue that the label "FPCR" is appropriate under the FCC's Truth-In-Billing Format Order. See 14 F.C.C.R. 7492 at P55 (1999). In addition, defendants claim that they made full and complete disclosures about the FPCR fee to its customers months before it was implemented. This disclosure informed customers when the FPCR fee was to begin, what it was going to be used for, and in what amount it would be charged.

61. Defendants did not inform their customers that the FPCR fee was not a tax or a government required charge until October 2002 when defendants informed their customers that the FPCR fee was going to be increased, shortly after plaintiffs' case was filed. At this time, they also informed customers that the FPCR was not a tax or mandated.

62. When the Court balances the strengths of the plaintiffs' claim against the defenses of the defendants, the Court finds that the outcome of the litigation would be far from certain, costly, time consuming, extremely lengthy, and expensive to both the plaintiffs and defendants. These very real dangers that both the plaintiffs and defendants would face if this case were to go forward, strongly indicate that the value of this settlement is substantial and brings real and immediate benefits to the settlement class while they may well not get anything if the case were to go forward or, if they did receive some benefits, may well not receive anything until years into the future after millions of dollars have been spent.

63. It is the surety of settlement that makes it a favored policy in dispute resolution as compared to unknown dangers and unforeseen hazards of litigation. See In re BankAmerica Corp. Secs. Litig. 210 F.R.D. 694, 701 (E.D. Mo. 2002) (recognizing it is often "proper to take the bird in hand instead of a prospective flock in the bush."). This is particularly the case when the value of the benefits obtained for the majority of the Class Members is or nearly equals their payments to Nextel.

2. The Benefits of the Settlement

64. The benefits of the settlement and the various classes within the settlement relate to the relative strengths and weakness of the legal claims of each class and subclass. As

described in the Findings of Fact, current customers are entitled to free anytime minutes without the need to fill in any forms, submit any claims, or prove any detrimental reliance on the alleged misleading FPCR charge as claimed by the plaintiff. Rather, these class members will receive this substantial benefit without doing anything at all except merely using the benefit conferred.

65. The value of the settlement for current customers is necessarily dependent upon the number of customers who use their minutes. Plaintiffs counsel employed several alternative methods to value the settlement for each of the subclasses based on various useage data obtained from defendants. That data is supported by declarations by two separate economists holding Ph.D's in economics.

66. After the Fairness Hearing the Court requested and was timely provided with additional factual data to support the claims made by the plaintiffs and defendants concerning the use of these bonus minuets. After carefully reviewing the data provided, it seems abundantly clear to this Court that these minutes are routinely used by a large percentage (in excess of 70% of the class) of defendants' customers and that they would be used if this Court approved this settlement.

67. Customers of the defendants who receive unlimited minutes are benefitted by the settlement in that they can choose the benefit of free internet service or text messaging. These benefits would otherwise cost these customers well in excess of what they were charged for the FPCR fee before they were clearly told that the fee was not a tax or surcharge.

68. Former customers also receive a substantial benefit in the settlement compared to the amount in which they have been damaged. Former customers can avail themselves of a

30 minute phone card or, should they choose to return to Nextel, free minutes and a waiver of the reactivation charge. Importantly, the settlement does not require former customers to come back to Nextel to receive a benefit; it is simply a choice they are given.

69. Although the total number of objectors is both legally and mathematically insignificant, the objectors claim the benefits to the class are illusory. However, these objectors failed to provide to the Court with any estimate of the value apart from mere conclusory statements that the benefits were illusory.

70. The Court finds that the benefits provided to current customers (Class A) are fair, reasonable and adequate and are not illusory.

71. The Court finds that former Nextel and Nextel Partners subscribers also receive substantial benefits that are fair, reasonable and adequate. Former subscribers who terminated because of the FPCR fee and paid an early termination fee during the months in which the fee was initiated or increased will receive the full $200 they were charged for terminating their agreements. Class Action Settlement Agreement at P8.5. To qualify, former subscribers must file a claim, by March 31, 2004, attesting to actual damages and that they canceled their Nextel wireless service because of price.

72. Class Counsel shall maintain and provide information about dispute resolution procedures on a telephone number to be determined and on its website, www.fpcrclassactionsettlement.com. Defendants will provide the website to current subscribers via Nextel News, and to former subscribers via the benefits/rejection of claim letter.

Any Class B claimant wishing to dispute the rejection of his/her claim, and any potential Settlement Class member wishing to dispute whether benefits were provided or the amount of benefits received, will be required to submit a form contesting the rejection of the B claim or the alleged failure to provide the benefits ("Objection Form"), said form to be maintained on Class Counsel's website and available by written request to Class Counsel. The Objection Form must be submitted within thirty (30) days from the postmark date of the rejection letter or, in the case of Class A claimants, within thirty (30) days from the last date on which minutes are to be provided under the Settlement, and shall be returnable to Class Counsel. Class Counsel or its agent shall initially review the Objection Form and provide copies to Defendants' counsel of all Forms received. Within thirty (30) days of receipt of the Objection Form by Class Counsel, the Settling Parties' counsel shall confer in an effort to agree on the proper resolution of each dispute. In the event that the Settling Parties' counsel are unable to agree, each unresolved Objection Form, together with documents reflecting the Defendants' basis for rejection, shall be submitted for binding resolution to independent third-party administrator Orran L. Brown at Defendants' sole expense. A written decision on the dispute will be issued within forty-five (45) days, with copies of the decision being sent to Class Counsel, the individual claimant or potential class member who submitted the Objection Form, and Defendants.

73. Former subscribers who do not fit in subclass B1 and paid the FPCR fee during the relevant period, and who file a proper claim form, also will receive substantial benefits that are fair, reasonable and adequate. At the former subscribers' option, they may receive either (1) free minutes on a long-distance calling card or (2) a waiver of the initiation fee upon resubscription and certain free Nextel or Nextel Partners

wireless minutes. Class Action Settlement Agreement, P8.6. Free phone minutes and account credits provide real and substantial value that other courts repeatedly have found fair and reasonable.

E. Prospective Relief

74. In addition to the benefits mentioned above, this Settlement Agreement adopts the prospective relief, on a nationwide basis, contained in the aforementioned Missouri Attorney General's settlement that imposes additional disclosure requirements in connection with Nextel's FPCR fee advertising and billing practices. Class Action Settlement Agreement at P9. The Missouri Attorney General's case alleged the same basic allegations as this case at bar and was only brought after this case was filed.

75. The settlement requires Nextel to provide disclosures in customer billing invoices mailed to consumers in a manner consistent with the format adopted by Nextel in February 2003. The settlement also requires Nextel to reorder the manner in which it disclosed the FPCR fee in advertisements that appear in Missouri.

76. This Court therefore concludes that the "most important" considerations -- the strength of the Plaintiffs' case on the merits, balanced against what is being offered in settlement -- favor final approval of the Settlement Agreement because it is fair, reasonable, and adequate. See Petrovic, 200 F.3d at 1150. Other considerations also support this result.

Other Relevant Considerations Weigh in Favor of Final Approval

a. The Number of Objectors Is Small When Compared to the Class As a Whole

77. Courts often consider the number of objectors in determining whether the settlement is fair to the entire class. See Reynolds v. National Football League, 584 F.2d 280, 287 (8th Cir. 1978). As stated by the court in In re Texas Prison Litigation, "the Court has an obligation not only to the minority of class members who filed objections, but also to the majority who, by their silence, indicated their approval of the Settlement Agreement." 191 F.R.D. at 175, (citing DeBoer, 64 F.3d at 1178).

78. A court may consider whether the number of objectors is large when compared to the class as a whole. 4 Newberg on Class Actions § 11:48 (4th ed. 2002). The percentage of objectors in this case is minuscule. Only 33 out of the 4,838,789 current and former account holders who were sent notice -- representing .00068% -- have objected to the settlement. Indeed, the number of Settlement Class members opting out of the settlement -- 620 out of 4,838,789 Settlement Class members -- represents only .00024% of the Settlement Class. These numbers are strong indicators that the Settlement Agreement was viewed as fair by an overwhelming majority of Settlement Class members and weighs heavily in favor of settlement. See, Van Horn, 840 F.2d at 606 (settlement affirmed with approximately 40% of the settlement class members objected to the proposal); In re Texas Prison Litigation, 191 F.R.D. at 175 (affirming a settlement agreement where approximately 8% of the class had objected).

b. The Complexity, Expense, and Likely Duration of Litigation

79. The possible length and complexity of further litigation is a relevant consideration to the trial court in determining whether a class action settlement agreement should be affirmed. See Petrovic, 200 F.3d at 1152; In re Prudential Ins. Co. of Am. Sales Practice Litig., 148 F.3d 283, 317-18 (3d Cir. 1998). It also resolves numerous state court cases currently pending around the country. If this Court were to reject this Settlement Agreement, this single piece of litigation would likely drag on for years, require the expenditure of millions of dollars, all the while class members would receive nothing. Defendants have numerous legal and affirmative defenses that will require full discovery, briefing and decision in the multiple venues where FPCR cases are pending. In the absence of the Settlement Agreement, the parties also will need to engage in further discovery and pre-trial work. Such matters as class certification, expert discovery, and summary judgment motions -- to name a few -- will have to be litigated, followed by a trial and likely appeals. In contrast to the delay and uncertainty attendant with such litigation, the Settlement Agreement provides substantial and immediate benefits. The Court concludes this consideration weighs in favor of approval.

F. The Rest of the Objections as to the Fairness of the Settlement are also Without Merit

a. Arguments that there was Collusion between the Parties

80. Some objectors assert that there was collusion between the parties. The parties have vehemently denied any such collusion. This Court agrees.

b. Objections as to the Settlements Claims Process

81. The Robertson objectors complain that the settlement claims process is "unfair" because it does not provide a deadline for filing claims. See Robertson Obj. at 10. The notice mailed to all Settlement Class members and published twice in *USA Today* informed potential claimants that they must file their claim forms by March 31, 2004. The same objectors complain that the settlement claims process is unfair because Defendants are the "sole arbiters" of who receives benefits. See id. at 8. The parties responded that this was not the case, and that they had agreed on a dispute resolution process to handle these issues. While eligibility for benefits asserted in claim forms must necessarily be confirmed by Defendants' records, this Court has requested the parties to further define the claims process. This was done and a firm mechanism is now in place to handle the claims and address any concerns class members have about the claims process. The objectors also complain that the claim form for former subscribers is "burdensome." The one-page form merely requires a claimant to provide enough information to enable Defendants to search their records to confirm that the claimant falls within the definition of the relevant subclass. This requirement is reasonable. The Court concludes these objections are not well taken and are without merit.

c. Objections as to the scope of the Release

82. A few objectors also complain that the scope of the release is impermissibly broad, asserting that it would release all contract claims of any kind against Defendants. See e.g., Robertson Obj. at 9; Objection of Robert Reznick at 1. However, the Settlement Agreement by its terms will release only those claims "which relate in any way to the FPCR fee." Settlement Agreement at P15 (Release); Tr. 76-77. Other objectors acknowledge that the release is limited to claims

related to the FPCR fee. See Objection of Stainless Systems, Inc. at 8. Objectors have used purposeful editing to confuse this issue more than necessary in an attempt to create an issue where there truly is not one. However, to resolve any concerns, the parties further clarified that the release only releases Class Members' claims that relate to the FPCR fee. This was done and is reflected in the amended Settlement Agreement. The Court concludes this objection is without merit.

d. Adequacy of Class Representatives

83. Some objectors complain that the Class Plaintiffs are not adequate class representatives because there are numerous subclasses and the Class Plaintiffs fall within only one of the subclasses.[5] See e.g., Dynamic Network Obj. at 12-14. Settlements with multiple subclasses receiving different benefits are common -- particularly where, as here, the subclasses are tied to differences in the context of and length of time to which class members were exposed to the alleged harm. See e.g., Petrovic, 200 F.3d at 1148; Grunin, 513 F.2d at 119; In re Texas Prison Litig., 191 F.R.D. at 169. "The interests of the various Plaintiffs do not have to be identical to the interests of every class member." Petrovic, 200 F.3d at 1148.

e. Objection based on New York Law

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[5] At least one objector asserts that the Class Plaintiffs are in the subclass that will receive the most benefits under the proposed settlement. In fact, however, the B(1) damages subclass, which does not include the Class Plaintiffs, will receive the greatest compensation - a $200 refund of any early termination fee paid.

84. One objector, Paul Lamia, contends that New York law prevents a federal court in Missouri applying federal law from settling this case since New York law prevents settlements under New York law when the action is "based on conduct occurring out of state, i.e., Missouri, on behalf of New York residents." Objection of Paul Lamia at 2. Mr. Lamia's argument is simply not accurate for several reasons. First, the parties are proposing to settle claims based on conduct that occurred in each of the 50 states, including New York -- namely, Nextel and Nextel Partners' collection and disclosure of the FPCR fee. Second, Mr. Lamia cites to no case holding that claims under New York General Business Law § 349 cannot be extinguished in a nationwide class action. Indeed, none of the cases cited by Mr. Lamia even support his position. In fact, none of the cases cited in his submission involved a **settlement** at all. Rather, each of the cases he provided dealt with a very basic element of the applicability of a state's law. Mr. Lamia's authority simply stood for the proposition that a non-New York resident who did not experience harm in New York may not sue under that New York statute. *See Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 774 N.E.2d 1190, 746 N.Y.S.2d 858 (N.Y. 2002) (summary judgment); *Mountz v. Global Vision Prods., Inc.*, No. 604243/02, 3 Misc. 3d 171, 770 N.Y.S.2d 603, 2003 N.Y. Misc. LEXIS 1619 (N.Y. Sup. Ct. Dec. 17, 2003) (motion to dismiss); *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 300 F. Supp. 2d 1107, 2003 U.S. Dist. LEXIS 22331 (D. Kan. Dec. 1, 2003) (motion to dismiss); *In re Simon II Litig.*, 212 F. Supp. 2d 57 (E.D.N.Y. 2002) (motion to dismiss); *Scott v. Bell Atl. Corp.*, 282 A.D.2d 180, 726 N.Y.S.2d 60 (N.Y. App. Div. 2001) (motion to dismiss); *Rich Prods. Corp. v. Kemutec, Inc.*, 66 F. Supp. 2d 937 (E.D. Wis. 1999) (summary judgment).

85. Mr. Lamia's theory, if he were correct, would defeat all nationwide class action settlements. Variations from state-to-state in the form of state law claims would always prevent a nationwide settlement, thereby defeating the efficiencies of the class action settlement mechanism. Such a position is plainly against the public policy favoring class action settlements and courts frequently and routinely approve nationwide class settlements, including consumer class actions involving state law claims. See e.g., *Feuerman v. Sears, Roebuck & Co.*, No. 96 Civ. 0120, 1996 U.S. Dist. LEXIS 16510 (S.D.N.Y. Nov. 4, 1996) (nationwide class settlement in California of claims for deceptive and unreasonable services charges; subsequent action by New York plaintiff under § 349 barred by settlement); *Williams v. GE Capital Auto Lease, Inc.*, 159 F.3d 266 (7th Cir. 1998) (nationwide class settlement in Illinois of claims of inadequate disclosures and unreasonable early termination charges; subsequent action in Florida barred by settlement); *Tropp v. Western-Southern Life Ins. Co.*, 2003 U.S. Dist. LEXIS 12565, No. 02 C 8341, (N.D. Ill. July 18, 2003) (nationwide class settlement of claims of consumer fraud in insurance billing practices; subsequent action barred by settlement). This objection provides no basis to defeat the settlement.

86. Further, under principles of issue preclusion long-recognized in New York, a "final conclusion" of claims arising from a transaction or series of transactions is given res judicata effect, even when other theories of law are employed as a basis for the final determination. *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 429 N.E.2d 1158, 445 N.Y.S.2d 687, 688 (N.Y. 1981). *See also Matsushita Elec. Indus. Co. Ltd. v. Epstein*, 516 U.S. 367, 374, 134 L. Ed. 2d 6, 116 S. Ct. 873 (1996). There is no requirement that New York law provide the legal basis for such a settlement for the settlement to bind New York plaintiffs.

87. The Lamia objection is overruled.

f. The Objections of the Three States Objectors

88. The objection by the Three States Objectors is similar to the arguments advanced by Mr. Lamia. They claim that particular features of the laws of Florida, Massachusetts, and Illinois give them different claims that cannot be compromised in a nationwide class settlement, even though those claims arise out of the same FPCR fee. See Objections by Consumers from Three States at 5-12. Like the New York objector Mr. Lamia, they have failed to provide any authority to support the proposition that variations in the form of state claims may defeat a nationwide class settlement. In addition, their state claims are particularly weak. These objectors admit they have no private right of action to enforce defendants' alleged violations of the law in these three states. They also admit that their claims arise out of the same occurrence as the Blando case.

89. A basic reading of these state E911 recovery statutes it is plain to see that these three states require defendants to assess a certain fee to their customers and then remit it to the states for E911. The FPCR fee was a separate fee charged by defendants who then kept the revenue they recovered. The FPCR fee simply does not have anything to do with the state E911 statutes as it relates to this case, and the Court concludes that this objection does not merit the settlement being disapproved.

g. Objections of Stainless Systems

90. Stainless Systems objects and seeks full-scale discovery into a speculative, potential claim. Stainless Systems theorizes that a claim might exist for unjust and unreasonable discrimination under Section 202 of the Communications Act. 47 U.S.C. § 202. Neither Stainless Systems nor any other class member sued under such a theory; nonetheless, Stainless Systems insists the Settlement should not be approved until there has been "adversarial investigation or litigation of such claims." Stainless Systems Obj. No. 2, at 3-4. The Court concludes that Stainless Systems does not have standing to assert the objection as it has not made a claim under § 202. Further, the Stainless Systems objection has no basis in the law.

h. This Court Has Subject-Matter Jurisdiction

91. One group of objectors initially asserted that the First Amended Complaint's federal cause of action under the Communications Act, 47 U.S.C. § 201(b), is "fraudulent" and fails to provide federal subject matter jurisdiction because Section 201(b) does not provide a cause of action for deceptive advertising or billing practices. *See* e.g., Robertson Obj. at 12-13. These objectors did not pursue this argument at the Fairness Hearing or in their post-fairness hearing filings. The argument has no merit. Under Section 201(b) of the Communications Act, "all charges, practices, classifications, and regulations for and in connection with [wireless] communication service" must be "just and reasonable," and those that are not just and reasonable are unlawful. 47 U.S.C. § 201(b). Under Section 207 of the Act, any person alleging damage by a carrier under Section 201(b) may either make a complaint to the FCC under Section 208 or bring suit for the recovery of damages in district court. 47 U.S.C. § 207; See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile

Services, 9 F.C.C.R. 1411 at P176 (1994) (the FCC does "not forbear from Sections 206, 207, and 209, so that successful complainants could collect damages"). There is no basis for objections that the Amended Complaint's federal cause of action under the Communications Act, 47 U.S.C. Section 201(b), is "fraudulent." This Court concludes that Plaintiffs' Complaint provides this Court with federal question subject-matter jurisdiction and the abandonment of this objection by the objectors evidences the weakness of this argument.

i. Request for Clarification of Certified Class and Request for Findings or Explanation by Objector Stainless Systems

92. Stainless Systems states that defendants submitted a proposed Order and Judgment which contains a definition of two major sub-classes, "current" and "former" customers. Stainless Systems states that there is an ambiguity with respect to the definition of the "current customer" sub-class. Stainless Systems states that unlike the "former customer" sub-class which has precise date restricted definitions, the "current customer" sub-class has no date defining criteria other than the word "current." Stainless Systems states that no matter how the "current customer" sub-class is defined, only those entities or individuals who are still subscribers when the settlement benefits are distributed will get any benefit, because the benefits for current customers are bonus minutes of defendants' wireless system. To receive the "former customer" benefits, the subscriber must have terminated before September 30, 2003. Stainless Systems states that the settlement purports to provide a remedy to subscribers who paid the FPCR fee during the period from its inception in early 2002 to September 2003, and since defendants lose customers on a constant basis, and the benefits will not be

distributed until after the settlement is final, many "current customers" will not receive a benefit. Stainless Systems refers to this as "shrinking benefits." Stainless Systems states that there is no "class period" specified in the Stipulation of Settlement or in the proposed judgment and that the plaintiffs and defendants have differing views regarding the definition of "current customer."

The Court has reviewed the class definitions for "current subscribers" contained in the Settlement Agreement and finds that these definitions adequately define the "current customer" subclasses. Stainless Systems avers that under the settlement, millions of subscribers who paid the FPCR fee will receive no remedy and that the "class definition" should be explicitly clear to facilitate review of the issue. Obviously, the wireless market is constantly changing and Nextel gains and loses customers every day. The Court finds that the Settlement clearly and specifically defines those customers who are entitled to receive benefits. Therefore, Stainless System's Request for Clarification of Certified Class and Request for Findings or Explanation is hereby **DENIED.** (Doc. # 234).

FINAL JUDGMENT

93. The settlement as set forth in the Settlement Agreement (as amended) is approved as fair, reasonable and adequate. Nextel and Nextel Partners are hereby directed to provide the settlement benefits set forth in the Settlement Agreement within the time provided in that Agreement (as amended).

94. This Action is hereby **DISMISSED WITH PREJUDICE** and without costs except as provided in P99 and in the Order granting the Motion for Attorneys Fees.

95. The claims of the Class Plaintiffs and all Settlement Class members, with the sole exception of those Settlement Class members who timely excluded themselves from the class by filing a request for exclusion by the deadline set by the Court, are hereby released pursuant to the terms of the release in the Settlement Agreement (as amended).

96. Class Plaintiffs and members of the Settlement Class and the successors and assigns of any of them are hereby permanently barred and enjoined from instituting, commencing, prosecuting or continuing to prosecute either directly or in any other capacity, any and all claims, rights or causes of action or liabilities whatsoever, which relate in any way to the Federal Programs Cost Recovery ("FPCR") fee charged by Nextel and/or Nextel Partners, including (without limitation), any and all claims, rights or causes of action or liabilities relating to (1) the assessment, charging, advertising, billing, and collection of the FPCR fee by Defendants to their customers in the United States and/or (2) the alleged failure by Nextel and/or Nextel Partners to honor the Settlement Class members' contracts in the United States through the assessment, charging, advertising, billing, and collection of the FPCR fee (collectively, "Claims").

97. Further, Class Plaintiffs and members of the Settlement Class and the successors and assigns of any of them are hereby ordered to dismiss any and all Claims currently pending against Nextel and/or Nextel Partners.

98. This Court shall retain jurisdiction over this case to assure implementation of the Settlement Agreement and to resolve any issues that may arise with respect to the interpretation of the Settlement Agreement (as amended), including but not limited to the scope of the releases contained

therein as well as any issues involving the decisions of the Claims Administrator.

99. Neither in this Order and Final Judgment, nor the Settlement Agreement (as amended), nor any of the negotiations or proceedings connected with it, nor any of the documents or statements referred to therein or submitted to the Court in connection therewith (collectively, "Settlement Materials") shall be offered or received against Nextel or Nextel Partners as evidence of, or construed as or deemed to be evidence of, any presumption, concession or admission by Nextel or Nextel Partners with respect to the truth of any fact alleged by Class Plaintiffs or Settlement Class Members or the validity of any claim that has been or could have been asserted in the Action or in any litigation, or the deficiency of any defense that has been or could have been asserted in the Action or in any litigation, or of any liability, negligence, fault, or wrongdoing of any kind by Nextel or Nextel Partners. The Settlement Materials shall not be offered or received against Nextel or Nextel Partners in any civil, criminal or administrative action or proceeding, other than such proceeding as may be necessary to effectuate the provisions of the Settlement Agreement (as amended), including to effectuate the release and liability protection granted to Nextel and Nextel Partners therein.

100. Class plaintiffs are hereby awarded $500 each (a total of $1,000 for both Class Plaintiffs) for their reasonable costs and expenses directly relating to the representation of the class, to be paid by Nextel and Nextel Partners pursuant to the terms and on the schedule set forth in the Settlement Agreement (as amended).

101. Accordingly, plaintiffs' Motion for Final Approval of the Class Action Settlement is hereby **GRANTED** (Docs.

42, 62). Class Counsel's Application for Award of Attorneys' Fees and Costs is addressed in a separate Order.

Date: April 20, 2004
Kansas City, Missouri
Fernando J. Gaitan, Jr.
United States District Judge

(2)
No. 04-1641

JUL 8 - 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

STAINLESS SYSTEMS INC.,
Petitioner,

v.

NEXTEL WEST CORP., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

EDWARD D. ROBERTSON, JR.
BARTIMUS, FRICKLETON, ROBERTSON & OBETZ, P.C.
715 Swifts Highway
Jefferson City, MO 65109
(573) 659-4454

TIMOTHY W. VAN RONZELEN
MATTHEW CLEMENT
COOK, VETTER, DOERHOFF & LANDWEHR, P.C.
231 Madison Street
Jefferson City, MO 65102
(573) 635-7977

Attorneys for Class Plaintiff-Respondents

HEIDI K. HUBBARD
Counsel of Record
DANE H. BUTSWINKAS
DANIEL H. ROSENTHAL
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000

Attorneys for Nextel Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether an objector in an opt-out class action can block a settlement on the ground that it contains a general release of all claims including a frivolous, hypothetical claim that the objector never asserted.

2. Whether affirmance of a court's exercise of discretion to approve a class action settlement that provides all class members with access to benefits creates a circuit conflict with decisions declining to approve certain settlements offering no compensation to class members.

3. Whether the district court, after carefully reviewing each of the factors for class action settlement approval, abused its discretion by approving this settlement as fair, reasonable, and adequate.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, the Nextel Respondents reference the corporate disclosure statement filed with their brief to the U.S. Court of Appeals to the Eighth Circuit, and state that no amendment is required.

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STATEMENT OF THE CASE

This case concerns a district court's exercise of discretion to approve an opt-out class action settlement arising from a line-item fee on the Nextel Respondents'[1] bills to customers. Nextel charges the fee—known as the "Federal Programs Cost Recovery" ("FPCR") fee—to cover costs associated with Nextel's compliance with certain federally mandated programs, including emergency 911 systems, wireless local telephone number portability, and telephone number pooling capabilities. P.C.A. 4a.[2]

In August 2002, Class Plaintiff-Respondents[3] filed the first of several suits on behalf of a nationwide class consisting of Nextel customers who were charged the FPCR fee. After discovery into all aspects of the fee, Nextel and the Class Plaintiff-Respondents engaged in lengthy settlement discussions that ultimately produced a proposed agreement. P.C.A. 24a-26a. The proposed settlement offered benefits (including free minutes, phone cards, refunds of certain termination fees, text messaging, or other wireless services) to all current and former Nextel subscribers who had paid the FPCR fee, as well as injunctive relief requiring Nextel on a going-forward basis to use certain language to describe the fee in its billing statements. P.C.A. 7a, 19a-20a, 27a-30a.

The U.S. District Court for the Western District of Missouri, where the case was pending, carefully evaluated each aspect of the proposed settlement. After notice, the opportunity to object or opt-out, a fairness hearing, and post-hearing briefing, the court concluded that the proposed settlement

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[1] The Nextel Respondents are Nextel West Corp., Nextel Communications, Inc., and Nextel Partners, Inc. (collectively, "Nextel").

[2] "P.C.A." refers to the Appendix to the Petition for Certiorari ("Pet. Cert."), which includes the lower court opinions.

[3] The Class Plaintiff-Respondents are Joseph A. Blando and James Sanders.

provided substantial benefits to members of the class. In approving the settlement, the court balanced those benefits against the relative merits of the class claims and considered the paucity of objectors and the complexity and expense of continued litigation. P.C.A. 40a-48a.

Several objectors appealed the district court's approval of the settlement to the U.S. Court of Appeals for the Eighth Circuit. The Eighth Circuit affirmed (3-0) the district court's ruling in its entirety. Of the objectors who had appealed to the Eighth Circuit, only the Petitioner, Stainless Systems Inc., sought rehearing *en banc* of the appellate court's decision. Without dissent, the Eighth Circuit denied rehearing *en banc*, and the panel denied Petitioner's motion for a stay of mandate. The mandate issued, and Stainless Systems filed this petition.

REASONS FOR DENYING THE WRIT

Petitioner Stainless Systems is the lone objector still standing in the way of implementation of the settlement. Petitioner has provided no basis for review by this Court.

Stainless Systems' first argument relies inappositely on a Court decision addressing an issue not present here, while complaining about the release of a frivolous, hypothetical claim that Stainless Systems never asserted. Its second argument attempts unsuccessfully to turn the district court's exercise of discretion into a "circuit conflict." And its final argument simply continues quibbling with the district court's exercise of discretion.

I. An objector in an opt-out class action cannot block a settlement on the ground that its general release would include a frivolous, hypothetical claim that the objector never asserted.

Class plaintiffs brought claims against Nextel under the Federal Communications Act, 47 U.S.C. § 201, and state con-

sumer fraud statutes. Stainless Systems now contends that a claim *might* exist under a different section of the Federal Communications Act, 47 U.S.C. § 202, although Stainless Systems never asserted such a claim. Indeed, no class member ever asserted a Section 202 claim. Relying—inapposite-ly—on *Devlin v. Scardelletti*, 536 U.S. 1 (2002), Stainless Systems now seeks to attack the settlement's general release on the grounds that it would release all claims arising from the FPCR fee including any hypothetical, unasserted (and meritless) claim under Section 202.

Stainless Systems misreads *Devlin*, which stands for the proposition that a class member objector who has not intervened to become a named party below still has "party status" for purposes of appealing the approval of a class settlement. *Id.* at 10 ("[N]onnamed class members are parties to the proceedings in the sense of being bound by the settlement. It is this feature of class action litigation that requires that class members be allowed to appeal the approval of a settlement when they have objected at the fairness hearing."). Here, Stainless Systems was not in any way prohibited from appealing by virtue of its status below as a "nonnamed party," so *Devlin* simply does not apply.[4]

Rather, Stainless Systems raises an issue not addressed by *Devlin*, namely whether Stainless Systems may block a class settlement because it would include the release of a (meritless) claim Stainless Systems never asserted. Stainless Systems provides no authority for such an alteration in the basic requirements for standing, and the law is to the contrary. *See Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) (a party "who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject") (internal quotation omitted); *see also*

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[4] Further, *Devlin* involved a *non*-opt-out class action. *Cf. infra* note 5.

Knisley v. Network Assocs., Inc., 312 F.3d 1123, 1126 (CA9 2002) (an objector lacks standing where a successful appeal would not redress his injuries). As the district court and Eighth Circuit recognized, therefore, Stainless Systems does not have standing to complain of the release of a frivolous claim that it never asserted. P.C.A.14a n.7; P.C.A. 54a.

Moreover, under Stainless Systems' argument, no opt-out class action settlement could be approved until any and every conceivable claim—no matter how remote and improbable of assertion—had been thoroughly litigated. As the district court found, however, the fulsome discovery that preceded this settlement explored all aspects of the FPCR fee. P.C.A. 24a-26a. And the speculative Section 202 claim, which was hypothesized by Stainless Systems but never asserted,[5] had no basis. P.C.A. 54a.[6]

II. The Eighth Circuit's affirmance of the district court's exercise of discretion has not created a circuit conflict.

Stainless Systems' attempt to manufacture a circuit conflict is equally unavailing. The Eighth Circuit affirmed the district court's exercise of discretion in approving the settlement, agreeing with the district court that (*inter alia*) the settlement provided access to benefits for all class members who chose to participate in the settlement. P.C.A. 19a-20a. That affirmance in no way creates a "conflict" with decisions by other courts declining to approve different settlements that provided no access to benefits. *See* P.C.A. 20a ("This is not a case where the settlement failed in its entirety to provide a

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[5] Of course, Stainless Systems had the option, if it so desired, to opt out of the settlement and pursue a Section 202 claim but did not do so.

[6] *Accord Orloff v. Vodaphone AirTouch Licenses*, Mem. Op. & Order, 17 F.C.C.R. 8987 (2002) (rejecting § 202 claim), *aff'd sub. nom. Orloff v. FCC*, 352 F.3d 415 (CADC 2003), *cert. denied*, 124 S. Ct. 2907 (2004); *Panatronic USA v. AT&T Corp.*, 287 F.3d 840 (CA9 2002) (same).

subclass with recovery"). *Compare Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 783-85 (CA7 2004) (relied upon by Stainless Systems) (proposed settlement awarded financial recovery to first class of plaintiffs but not to second); *Molski v. Gleich*, 318 F.3d 937, 953-54 (CA9 2003) (relied upon by Stainless Systems) (named plaintiff and class counsel received compensation but all other class members received nothing); *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 660 F.2d 9, 19 (CA2 1981) (relied upon by Stainless Systems) ("class member holding one liquidated and one unliquidated contract receives no more than another class member holding only one liquidated contract"); *see also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 110 (CA2 2005) (relied upon by Stainless Systems) (affirming *approval* of class settlement).

Like Stainless Systems' complaint about the release of an unasserted, frivolous claim, *see infra* Part I, Stainless Systems' complaint that certain class members may ultimately elect not to participate in the settlement is nothing more than a backdoor attack on the district court's exercise of discretion. The district court weighed all relevant factors (including the relative merits of class claims, the benefits offered, the miniscule number of objectors, and the small percentage of opt-outs) and found the settlement fair, reasonable, and adequate. That Stainless Systems disagrees does not provide a basis for granting the writ of certiorari.

III. The district court applied the appropriate factors and properly exercised its discretion in approving the settlement, warranting affirmance by the Eighth Circuit.

Stainless Systems' final argument is a variation on the same theme. Stainless Systems contends that the district court and Eighth Circuit did not properly analyze the settlement under Federal Rule of Civil Procedure 23(e)(1)(C).

This argument is long on rhetoric but devoid of legal substance. As the Eighth Circuit found, "the district court entered a detailed order evaluating the strength of the class claims against the strengths of Nextel's defense in conjunction with the features of the settlement offer." P.C.A. 17a. The district court concluded "that the outcome of the litigation would be far from certain, costly, time consuming, extremely lengthy, and expensive to both the plaintiffs and defendants." P.C.A. 42a. The Eighth Circuit reviewed the district court's detailed decision and found no abuse of discretion. Stainless Systems' desire simply to rehash its assertions of abuse of discretion—thereby further delaying implementation of the settlement—provides no basis for review by this Court.

CONCLUSION

For the reasons stated, certiorari should be denied.

Respectfully submitted,

EDWARD D. ROBERTSON, JR.
BARTIMUS, FRICKLETON,
ROBERTSON & OBETZ, P.C.
715 Swifts Highway
Jefferson City, MO 65109
(573) 659-4454

TIMOTHY W. VAN RONZELEN
MATTHEW CLEMENT
COOK, VETTER, DOERHOFF &
LANDWEHR, P.C.
231 Madison Street
Jefferson City, MO 65102
(573) 635-7977

Attorneys for Class Plaintiff-Respondents

HEIDI K. HUBBARD
Counsel of Record
DANE H. BUTSWINKAS
DANIEL H. ROSENTHAL
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000

Attorneys for Nextel Respondents

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In the Supreme Court of the United States

STAINLESS SYSTEMS INCORPORATED,
Petitioner,

v.

NEXTEL WEST CORP., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

CHARLES D. CHALMERS
Counsel of Record

20 SUNNYSIDE AVENUE
SUITE A#199
MILL VALLEY, CA 94941-1928
(415) 860-8134

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

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PETITIONER'S REPLY

There are two points which petitioner believes should be brought to the Court's attention. The first responds to Respondents' argument that *Devlin* is not properly cited by petitioner on the standing issue. The second is suggested by their statement that *Devlin* is distinguishable because it involved a non-opt-out class while the present case was certified as an opt-out class.

At least one Court of Appeal has stated that *Devlin* stands for the proposition that a class member has "standing" to appeal. *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 299 (3d Cir. 2005). As petitioner does here, the court in *In re Rite Aid* relied on Rule 23(e)(1)(A), which allows a class member to object to a settlement.

The Eighth Circuit has, in dicta, questioned whether *Devlin's* holding that a class member has the right to appeal the approval of a settlement applies to opt-out class action settlements. *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 302 F.3d 799, 800 (8th Cir.2002)(relying on an Arkansas Supreme Court holding to that effect; *Ballard v. Advance America*, 349 Ark. 726, 80 S.W.3d 374 (2002). It has also strongly implied in a holding that *Devlin* does not apply when a class member has the right to opt-out. *Snell v. Allianz Life Ins. Co. of N. Am.*, 327 F.3d 665, 670 n. 2 (8th Cir. 2003). The Ninth Circuit has held that *Devlin* does apply to permit an objector to appeal in opt-out class settlements. *Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 572 (9th Cir. 2004)

The Eighth Circuit's holding that petitioner could not challenge the settlement due to a lack of standing is clear, if cryptic. It would be desirable, perhaps, to have some

explanation for the basis of this dramatic departure from the existing authority on the standing of class members to object to a settlement. Respondents suggest that it is related to the distinction between an opt-out and a non-opt-out class action settlement.

Respectfully submitted,

Charles D. Chalmers, Esq.
20 Sunnyside Avenue
Suite A #199
Mill Valley, CA 94941-1928